

# Justice O'Connor's Twenty-Five Year Expectation: The Legitimacy of Durational Limits in *Grutter*

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*One of the controversial aspects of the Supreme Court's decision in Grutter v. Bollinger was its stated expectation that racial preferences would no longer be necessary in twenty-five years. Members of the Court variously described that pronouncement as a "holding" or simply a "hope." Scholars have subsequently provided theories to cover much of the space on the spectrum between those endpoints. This Article addresses the constitutional legitimacy of durational limits on race conscious admissions—in particular, Justice O'Connor's twenty-five year expectation. It argues that her statement is best understood as stating a non-binding expectation. Although this Article suggests that some notion of durational limit is consistent with constitutional norms, it argues that the twenty-five year expectation is problematic to the extent that it is understood as imposing a definite endpoint. The Article suggests that the twenty-five year expectation should be construed consistently with the ideals implicit in Brown v. Board of Education and mindful of lessons learned from Brown v. Board of Education II. Such a consideration confirms the conclusion that race conscious admissions programs should continue so long as needed to serve the interests the Court identified in Grutter and that the twenty-five year expectation should be so construed.*

## I. INTRODUCTION

Proponents of race-conscious admissions programs found much that was heartening about the Supreme Court's decision in *Grutter v. Bollinger*.<sup>1</sup> It upheld the use of some such plans and placed them on a stronger foundation than had its predecessor, *Regents of University of California v. Bakke*.<sup>2</sup> It signaled that such programs should be reviewed under a more deferential

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<sup>1</sup> *Grutter v. Bollinger*, 539 U.S. 306 (2003).

<sup>2</sup> *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

form of strict scrutiny. It expanded the rationale which Justice Powell had recognized as compelling in *Bakke*, by going beyond campus diversity to include the instrumental goal of affording greater opportunities for disadvantaged minorities to participate in the American dream. In all of these ways, *Grutter* represented a great triumph for race-conscious admissions.<sup>3</sup>

Yet, in the closing lines of the majority opinion, Justice O'Connor introduced a concept which diminished, to some extent, the victory.<sup>4</sup> "[A]ll governmental use of race must have a logical end point," she wrote.<sup>5</sup> "We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today," she wrote.<sup>6</sup>

The twenty-five year timetable attracted widespread attention and has aroused considerable confusion<sup>7</sup> and controversy.<sup>8</sup> The Court had previously spoken of time limits as a relevant feature of affirmative action plans.<sup>9</sup> In those instances, however, the plans under review had explicitly or implicitly included durational features. In *Grutter*, the Court itself introduced the limit.<sup>10</sup> "At first blush, the Court's pronouncement seemed overly optimistic, if not woefully out of place in a judicial opinion," observed Professor Kevin R. Johnson.<sup>11</sup> As Professor Johnson's comment signaled, the twenty-five year timetable raised questions regarding its justification. Was such a feature legitimate as a matter of constitutional doctrine and practice? Was it practical

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<sup>3</sup> See generally Joel K. Goldstein, *Beyond Bakke: Grutter-Gratz and the Promise of Brown*, 48 ST. LOUIS U. L.J. 899, 901-02 (2004).

<sup>4</sup> See, e.g., MARK TUSHNET, *A COURT DIVIDED: THE REHNQUIST COURT AND THE FUTURE OF CONSTITUTIONAL LAW* 236 (2005) (calling opinion "a nearly complete victory for proponents of affirmative action" with the "only concession" its insistence on a sunset provision).

<sup>5</sup> *Grutter*, 539 U.S. at 342.

<sup>6</sup> *Id.* at 343.

<sup>7</sup> See Mark W. Cordes, *Affirmative Action After Grutter and Gratz*, 24 N. ILL. U. L. REV. 691, 739 (2004) (describing the twenty-five year timetable as the "most curious part" of the opinion).

<sup>8</sup> See, e.g., Stuart Taylor, Jr., *The Affirmative Action Decisions*, in *A YEAR AT THE SUPREME COURT* 90, 91 (Neal Devins & Davison M. Douglas, eds., 2004) (accusing Justice O'Connor of "willful blindness to inconvenient facts"); Abigail Thernstrom & Stephan Thernstrom, *Secrecy and Dishonesty: The Supreme Court, Racial Preferences, and Higher Education*, 21 CONST. COMMENT. 251, 265 (2004) (describing the twenty-five year timetable as "careless, disingenuous").

<sup>9</sup> See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 238 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 510 (1989).

<sup>10</sup> Neal Katyal, *Sunsetting Judicial Opinions*, 79 NOTRE DAME L. REV. 1237, 1244 (2004).

<sup>11</sup> Kevin R. Johnson, *The Last Twenty Five Years of Affirmative Action?*, 21 CONST. COMMENT. 171, 172 (2004).

to assume that such programs would disappear in June, 2028, twenty-five years after the Court decided *Grutter*?

In fact, Justice O'Connor's treatment of durational limits raised a preliminary question: What did the Court mean by its twenty-five year discussion? Did it impose a limit at all? The twenty-five year reference is ambiguous and accordingly lends itself to academic speculation. In one sense, efforts to decipher Justice O'Connor's meaning may offer little return.<sup>12</sup> After all, whether race-conscious plans may continue beyond 2028 will turn on what the Court decides in or before that year, not what the Court intended in *Grutter*. Yet, the question is one worth answering. It has practical significance for those with a direct interest in race-conscious admissions, it raises important issues regarding constitutional law and the judicial role, and it helps bring into focus certain tendencies of our society regarding race.

This Article proceeds in three stages. First, in Section II, it seeks to understand the Court's twenty-five year timetable. The Article argues that the twenty-five year timetable reflects an expectation, not a fixed limit. As such, this Article rejects Justice Thomas's claim that the Court held that race preferences will be illegal in twenty-five years. To the extent that the twenty-five year expectation is unclear, it should be seen as stating an aspiration, not setting a limit. In the event that Justice O'Connor's twenty-five year expectation is not realized, race preferences should continue to be regarded as constitutional so long as they are the best means to achieve the interests that *Grutter* recognized as compelling.

Second, in Section III, the Article explores the legitimacy of durational limits in general and the Court's twenty-five year expectation in particular. Its canvass of a range of issues relating to constitutional interpretation and doctrine suggests that some notion of durational limits is generally consistent with constitutional norms. The twenty-five year expectation is more problematic, particularly if viewed as imposing a limit. To the extent that it imagines the possibility that race-sensitive admissions might end before they are unnecessary, it is at odds with the antisubordination theory, which constitutes the best account of the Equal Protection Clause. Moreover, the twenty-five year expectation raises institutional questions regarding judicial competency to impose such a timetable in this instance.

Finally, this Article suggests that the twenty-five year expectation can profitably be considered under the large shadow cast by *Brown v. Board of Education*.<sup>13</sup> During 2004, dozens, if not hundreds, of institutions celebrated the fiftieth anniversary of *Brown*. It was appropriate that they did

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<sup>12</sup> See Katyal, *supra* note 10, at 1238 (referring to "some overeager folks . . . already engaging in a debate about what her statement means").

<sup>13</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

so because the Court's 1954 decision, whatever its faults, stands as a metaphor for some of the highest ideals of our constitutional democracy.<sup>14</sup> Justice O'Connor appropriately sounded some of those themes in her majority opinion in *Grutter v. Bollinger*.<sup>15</sup>

We tend to forget that 2005, like 2004, also marked the fiftieth anniversary of an opinion in *Brown v. Board of Education*. On May 31, 1955, the Court issued *Brown II*,<sup>16</sup> its opinion regarding school desegregation remedies. In it, the Court postponed the effective date when the Constitution would require school districts to integrate, directing them simply to move toward that goal "with all deliberate speed."<sup>17</sup> While *Brown's* golden anniversary received the attention such a jubilee deserves, this second anniversary passed amidst a resounding silence. *Brown II* certainly was not a triumph and merits no celebration. But our collective amnesia regarding *Brown II* is unfortunate. It, like *Brown*, has something to contribute as we consider the legitimacy and practicality of doing away with race preferences in the next twenty-five years, or more precisely, twenty-five years from June, 2003.

*Brown* and *Brown II* represent metaphors for different approaches to America's racial past. Whereas *Brown* articulated a sweeping new constitutional norm which promised to transform the treatment of blacks in America, *Brown II* compromised that vision in deference to certain white sensibilities. While much of *Grutter* resonates with the vision of *Brown*, the twenty-five year expectation carries hints of *Brown II*. Section IV argues that the core values of *Brown* dictate against viewing the twenty-five year expectation as a limit. It further argues that the lessons from *Brown II* should guide an effort to realize the promise of *Brown*.

## II. GRUTTER AND TIME LIMITS

### A. What the Court Said

The Supreme Court's decision in *Grutter v. Bollinger*<sup>18</sup> represented a substantial victory for race-conscious admissions programs. Its predecessor, *Regents of University of California v. Bakke*,<sup>19</sup> upheld the constitutionality of

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<sup>14</sup> See Joel K. Goldstein, *Approaches to Brown v. Board of Education: Some Notes on Teaching a Seminal Case*, 49 ST. LOUIS U. L.J. 777, 789-90 (2005).

<sup>15</sup> See Goldstein, *Beyond Bakke*, *supra* note 3, at 951-52.

<sup>16</sup> *Brown*, 349 U.S. at 301.

<sup>17</sup> *Id.*

<sup>18</sup> *Grutter v. Bollinger*, 539 U.S. 306 (2003).

<sup>19</sup> *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

some race-conscious admissions plans but produced no majority opinion.<sup>20</sup> Some lower courts did not feel compelled to accept *Bakke* as precedent.<sup>21</sup> In *Grutter*, five justices (Justices O'Connor, Stevens, Souter, Ginsburg, and Breyer) agreed that race could be considered to achieve campus diversity so long as it was used in a non-mechanical fashion as one among many diversity factors.<sup>22</sup> A sixth, Justice Kennedy, agreed that diversity could be regarded as a compelling constitutional interest, although he thought the Law School's plan was not narrowly tailored.<sup>23</sup> Although the Court followed Justice Powell's *Bakke* approach in applying strict scrutiny to such plans, the Court's review applied a gentler version of that standard.<sup>24</sup> Whereas Justice Powell's opinion in *Bakke* had identified campus diversity as a compelling interest, *Grutter* broadened the diversity rationale to recognize not simply the benefit of diversity to campus life but also the payoff to society after graduation by preparing more minorities for leadership roles.<sup>25</sup> In language echoing the implicit message of *Brown*, Justice O'Connor wrote: "Effective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation indivisible, is to be realized."<sup>26</sup> Race-conscious admissions would not simply enhance educational opportunities on campus but would also help make America a land in which all could participate and succeed. Although the Court struck down the formulaic

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<sup>20</sup> Four members of the Court (Chief Justice Burger; Justices Stewart, Rehnquist, and Stevens) concluded that Davis' sixteen place set-aside for minority applicants violated Title VI of the Civil Rights Act of 1964; they accordingly never reached the constitutional question in the case. *Id.* at 421 (Stevens, J., concurring in part, dissenting in part). Four other justices (Justices Brennan, White, Marshall, and Blackmun) thought Davis' plan complied with both the Equal Protection Clause and Title VI. *Id.* at 325 (Brennan, J., concurring in part, dissenting in part). They would have used intermediate scrutiny to review race-conscious admissions plans. *Id.* at 358–59. They would have recognized remedying societal discrimination as a compelling interest under strict scrutiny. *Id.* at 362. Justice Powell wrote the decisive opinion but one in which his colleagues did not join. He concluded that the Court must scrutinize race-conscious admissions plans under strict scrutiny and found that the Davis set-aside violated that standard. Under strict scrutiny, remedying societal discrimination was not a compelling interest but achieving campus diversity was.

<sup>21</sup> See, e.g., *Johnson v. Bd. of Regents of the Univ. of Ga.*, 263 F.3d 1234, 1247 (11th Cir. 2001); *Hopwood v. Texas*, 236 F.3d 256, 274–75 (5th Cir. 2000); *Hopwood v. Texas*, 78 F.3d 932, 944 (5th Cir. 1996). But see *Smith v. Univ. of Wash. Law Sch.*, 233 F.3d 1188, 1200–01 (9th Cir. 2000).

<sup>22</sup> *Grutter*, 539 U.S. 306.

<sup>23</sup> *Id.* at 387–88 (Kennedy, J., dissenting).

<sup>24</sup> See generally Goldstein, *Beyond Bakke*, *supra* note 3, at 920–28.

<sup>25</sup> See generally *id.* at 944–45.

<sup>26</sup> *Grutter*, 539 U.S. at 332.

system Michigan used for undergraduate admissions as not sufficiently narrowly tailored to satisfy Equal Protection,<sup>27</sup> it held that the use of targets to achieve a critical mass of disadvantaged minorities at Michigan's Law School ("Law School") did not constitute an impermissible quota. But the Court also voiced an expectation that race-conscious remedies would be unnecessary in twenty-five years.<sup>28</sup> This focus on projecting the end of race-conscious admissions has caused much consternation among proponents of these plans.

It is important to place this aspect of the Court's opinion in proper context. The Court spent less than two pages, only four paragraphs, of its thirty-eight page *Grutter* opinion on the durational limit. Justice O'Connor turned to the subject in closing, almost as an afterthought, near the end of her explanation of the Court's conclusion that the Michigan Law School plan was narrowly tailored to serve the compelling interest of diversity. The Court previously had stated that "[t]o be narrowly tailored" a race-conscious admissions program could not use quotas but could consider race as one plus factor, among others, in considering applicants in a common pool.<sup>29</sup> The key word was "flexible," one Justice O'Connor used six times in seven paragraphs.<sup>30</sup> The existence of race-neutral alternatives did not impeach the Law School's approach; "[n]arrow tailoring does not require exhaustion of every conceivable race-neutral alternative."<sup>31</sup> The Law School must, in good faith, consider such alternatives but need not follow those which would "require a dramatic sacrifice of diversity, the academic quality of all admitted students, or both."<sup>32</sup> Further, the Court concluded that race preferences must "not unduly harm members of any racial group."<sup>33</sup> This requirement of narrow tailoring flowed from the recognition that racial preferences presented "'serious problems of justice.'"<sup>34</sup>

After having rejected Barbara Grutter's arguments that the Law School's plan was not narrowly tailored, Justice O'Connor introduced durational limits. Racial classifications, "however compelling their goals, are potentially so dangerous that they may be employed no more broadly than the interest

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<sup>27</sup> *Gratz v. Bollinger*, 539 U.S. 244, 249 (2003).

<sup>28</sup> *Grutter*, 539 U.S. at 343 ("We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.").

<sup>29</sup> *Id.* at 334.

<sup>30</sup> *Id.* at 334–37.

<sup>31</sup> *Id.* at 339.

<sup>32</sup> *Id.* at 340.

<sup>33</sup> *Id.* at 341.

<sup>34</sup> *Grutter v. Bollinger*, 539 U.S. 306, 341 (2003) (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 298 (1978)).

demands.”<sup>35</sup> Making racial preferences permanent would offend the mission of the Equal Protection Clause to eliminate government imposed race discrimination.<sup>36</sup> Thus, such programs must have time limits. Universities could satisfy “the durational requirement” by “sunset provisions in race-conscious admissions policies and periodic reviews to determine whether racial preferences are still necessary to achieve student body diversity.”<sup>37</sup> Universities should monitor various states’ experiments with race-neutral alternatives.<sup>38</sup> Durational limits also served a public relations purpose: they would “assure . . . all citizens that the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter, a measure taken in the service of the goal of equality itself.”<sup>39</sup> The Court took the Law School “at its word” that it would like to find a race-neutral alternative and would end race preferences “as soon as practicable.”<sup>40</sup> A quarter-century ago, Justice Powell approved “the use of race to further an interest in student body diversity in the context of public higher education.”<sup>41</sup> Since *Bakke*, more minority applicants had achieved high grades and test scores. “We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.”<sup>42</sup>

The issue of durational limits had figured in the argument of the case, but only in passing. No principal brief devoted more than a few sentences to the subject. Grutter urged the Court not to recognize campus diversity as a compelling interest because to do so would “give the Nation its first *permanent* justification for racial preferences.”<sup>43</sup> The Law School conceded that “race-conscious programs must have reasonable durational limits” and argued that its “resolve to cease considering race when genuine race-neutral alternatives become available” provided such a boundary.<sup>44</sup> But the Court should not “dignif[y] with a place in our constitutional jurisprudence”

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<sup>35</sup> *Id.* at 342.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 342 (quoting *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 510 (1989)).

<sup>40</sup> *Grutter*, 539 U.S. at 343.

<sup>41</sup> *Id.* (quoting *Bakke*, 438 U.S. at 317–18).

<sup>42</sup> *Id.*

<sup>43</sup> Brief for the Petitioner at 33, *Grutter*, 539 U.S. 306 (No. 02-241). *See id.* at 42 (labeling preference regime as “inherently a permanent one”). Justice O’Connor argued that equal protection would be offended by “a permanent justification for racial preferences.” *Grutter*, 539 U.S. at 342.

<sup>44</sup> Brief for Respondents at 33, *Grutter*, 539 U.S. 306 (No. 02-241).

Grutter's assumption that race preferences will be permanent "merely because three decades of modest effort have not yet erased" disparities in academic performance.<sup>45</sup> In reply, Grutter gave only two sentences to the subject. Bollinger's "some day" assurance confirmed "that the planned duration is indefinite," as any time limit based on "the lingering effects of societal discrimination" would be.<sup>46</sup>

In all likelihood, the Court's discussion of durational limits reflected Justice O'Connor's influence,<sup>47</sup> not that of her four colleagues who joined her opinion. She was the swing vote, and she wrote the opinion. More significantly, at oral argument in *Grutter*, she questioned the Law School's attorney on this point:

In all programs which the Court has upheld in the area of—you want to label it affirmative action, there's been a fixed time period within which it would operate. You could see at the end—an end to it, there is none in this, is there? How do we deal with that aspect?<sup>48</sup>

Indeed, her colleagues associated her with the time limits question. During the argument in *Gratz v. Bollinger*, another Justice asked Michigan's counsel, "Mr. Payton, let me ask Justice O'Connor's question, when does all of this come to an end?"<sup>49</sup> Justice O'Connor's question was clearer than Justice O'Connor's answer.

### B. *Understanding the Twenty-Five Year Expectation: The Words Used*

The most salient feature of Justice O'Connor's discussion of durational limits is its ambiguous character.<sup>50</sup> As Justice Kennedy observed, "[i]t is

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<sup>45</sup> *Id.*

<sup>46</sup> Petitioner's Reply Brief at 18, *Grutter*, 539 U.S. 306 (No. 02-241).

<sup>47</sup> While *Grutter* was pending, Justice O'Connor attended a meeting with members of the Supreme Court of India. When one of the Justices of the Supreme Court of India opined that India's caste-based quota system would never end, Justice "O'Connor raised her eyebrow in response" and gave an advocate of affirmative action "a meaningful glance of reproach." Jeffrey Rosen, *How I Learned to Love Quotas*, N.Y. TIMES MAG., June 1, 2003, at 52.

<sup>48</sup> Transcript of Oral Argument at 41, *Grutter*, 539 U.S. 306 (No. 02-241).

<sup>49</sup> Transcript of Oral Argument at 47, *Gratz v. Bollinger*, 539 U.S. 244 (2003) (No. 02-516).

<sup>50</sup> See, e.g., Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 STAN. L. REV. 953, 1092 (2005) ("it is not at all obvious even what Justice O'Connor's assertion means"); Vikram David Amar & Evan Caminker, *Constitutional Sunsetting?: Justice O'Connor's Closing Comments in Grutter*, 30 HASTINGS CONST. L.Q. 541, 541 (2003) ("The intended meaning of this sentence is highly ambiguous."); Cordes, *supra* note 7, at



difficult to assess the Court's pronouncement."<sup>51</sup> The threshold challenge regarding durational limits is to discover what the Court means.<sup>52</sup> There are few good markers to guide this search. The hunt is complicated by the inconsistent clues the Court provides. Four other opinions representing the views of six justices construed Justice O'Connor's discussion in four different ways. Justice Thomas (joined by Justice Scalia) regarded it as "holding" that race-conscious admissions will be "illegal" come 2028.<sup>53</sup> Justice Kennedy termed her discussion a "pronouncement" that they will be "unnecessary."<sup>54</sup> Yet, in the principal dissent, Chief Justice Rehnquist (joined by the three foregoing members) found the twenty-five year timetable too ambiguous and tenuous to constitute a real durational limit, a conclusion at odds with Justice Thomas's characterization. He read the Court as suggesting "a possible 25-year limitation on the Law School's current program."<sup>55</sup> The Chief Justice found that Justice O'Connor's "discussions of a time limit are the vaguest of assurances,"<sup>56</sup> which would allow the Law School to use race preferences "on a seemingly permanent basis."<sup>57</sup> Far from imposing a twenty-five year limit, the Court "casually subverted" the requirement that affirmative action programs be time limited.<sup>58</sup> Justice Ginsburg (joined by Justice Breyer) thought the twenty-five year expectation was simply a "hope."<sup>59</sup>

A Court outsider cannot now know what insights Justice O'Connor's colleagues may have gained regarding her thinking from her comments at conference or from internal Court memoranda or discussions. Better informed judgments may occur if, and when, files of some current members

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741 ("It is not altogether clear what to make of the" twenty-five year expectation language.); Johnson, *supra* note 11, at 180 ("The 25 year expectation for the end of affirmative action was curious, even to other Justices on the Court."); Katyal, *supra* note 10, at 1244 (referring to *Grutter* as "hazy" regarding sunset provision); Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 67 n.306 (2003) (referring to "strangely uncertain air" of Court's discussion).

<sup>51</sup> *Grutter v. Bollinger*, 539 U.S. 306, 394 (2003) (Kennedy, J., dissenting). Justice Kennedy mischaracterized Justice O'Connor's statement in attributing to the Court the idea that race-conscious programs "will be" unnecessary in twenty-five years.

<sup>52</sup> *But see* Katyal, *supra* note 10, at 1238 (stating that "some overeager folks are already engaging in a debate about what her statement means").

<sup>53</sup> *Grutter*, 539 U.S. at 351, 375, 376, 376 n.13, 377 (Thomas, J., concurring in part, dissenting in part).

<sup>54</sup> *Id.* at 394 (Kennedy, J., dissenting).

<sup>55</sup> *Id.* at 386 (Rehnquist, C.J., dissenting).

<sup>56</sup> *Id.* at 386-87.

<sup>57</sup> *Id.* at 387.

<sup>58</sup> *Id.*

<sup>59</sup> *Grutter*, 539 U.S. at 346 (Ginsburg, J., concurring).

of the Court are opened to the public. Nonetheless, pending that development, the wide disparity in the characterizations of Justice O'Connor's discussion suggests that she offered nothing dispositive in those forums.

Contrary to some discussion,<sup>60</sup> the Court certainly did not put a twenty-five year "limit" on race-conscious admissions programs. Although at five places in his opinion Justice Thomas rather disingenuously claimed that *Grutter* had held that race-conscious plans would be illegal in twenty-five years or words to that effect,<sup>61</sup> that description finds no support in the language the Court used. Justice O'Connor did not characterize the twenty-five year sentence as a holding. Justice O'Connor wrote: "We expect that 25 years from now, the use of racial preferences will no longer be necessary . . ."<sup>62</sup> Of course, an expectation is neither a holding nor a limit. Moreover, her deference to the Law School and her apparent satisfaction that it "will terminate its race-conscious admissions programs as soon as practicable"<sup>63</sup> refutes the idea that she was setting a hard and fast deadline. The contrast between her unequivocal insistence that such plans have a logical end point<sup>64</sup> and her twenty-five year expectation provides further evidence of the more flexible nature of the latter.<sup>65</sup>

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<sup>60</sup> See, e.g., *id.* at 351 (Thomas, J., concurring in part, dissenting in part). Cf. Martin H. Belsky, *Accentuate the Positive, Eliminate the Negative, Latch on to the Affirmative [Action], Do Mess with Mr. In-Between*, 39 TULSA L. REV. 27, 46 (2003) (stating that Justice O'Connor indicated "that for a period of up to twenty-five years, diversity based *Grutter* type programs would be considered acceptable"); Johnson, *supra* note 11, at 181-82 (referring to twenty-five year "limit").

<sup>61</sup> *Grutter*, 539 U.S. at 351 (2003) (Thomas, J., concurring in part, dissenting in part) ("I agree with the Court's holding that racial discrimination in higher education admissions will be illegal in 25 years."); *id.* at 375 ("The Court also holds that racial discrimination in admissions should be given another 25 years before it is deemed no longer narrowly tailored to the Law School's fabricated compelling state interest."); *id.* at 376 ("Nor is the Court's holding that racial discrimination will be unconstitutional in 25 years made contingent on the gap closing in that time."); *id.* at 376 n.13 ("I agree with Justice Ginsburg that the Court's holding that racial discrimination in admissions will be illegal in 25 years is not based upon a 'forecast' . . ."); *id.* at 377 ("I therefore can understand the imposition of a 25-year time limit only as a holding . . ."); see also *id.* at 351 ("stating that racial discrimination will no longer be narrowly tailored, or 'necessary to further' a compelling state interest, in 25 years"); *id.* at 370 (Court prefers "to grant a 25-year license to violate the Constitution").

<sup>62</sup> *Grutter*, 539 U.S. at 343.

<sup>63</sup> *Id.*

<sup>64</sup> See *id.* at 342 (stating that "race-conscious admission policies must be limited in time" and that "all governmental use of race must have a logical end point").

<sup>65</sup> See Cordes, *supra* note 7, at 742.

The opinions of other justices confirmed the more amorphous character of the twenty-five year reference. Justices Ginsberg and Breyer, who joined the majority and accordingly had some standing to interpret its opinion, suggested that the expectation was not even a forecast; they called it a hope.<sup>66</sup> Similarly, the comments of Chief Justice Rehnquist and Justice Kennedy, both of whom dissented from Justice O'Connor's view, were telling. Chief Justice Rehnquist's account of the twenty-five year expectation was 180 degrees from Justice Thomas's. Far from seeing it as creating a finite license, he complained that it set no boundary<sup>67</sup> and that it authorized race preferences on an infinite basis.<sup>68</sup> Justice Kennedy's reference is more inscrutable. He found "the Court's pronouncement" to be "difficult to assess."<sup>69</sup> Still, his interpretation falls somewhere between those of Justices Thomas and Ginsburg. He described it as a statement that race preferences "will be unnecessary 25 years from now," not that they would be unlawful.<sup>70</sup> Thus, he seemed to see it as a prediction, not as a hope or a holding. While Justices Thomas and Scalia portrayed the twenty-five year period as an outer limit which could not be extended, the other justices seemed to regard it as a somewhat tentative timetable anchored in a loose foundation.

A number of informed observers also disputed Justice Thomas's claim. Like Chief Justice Rehnquist, Professor Charles Fried, Solicitor General under President Ronald Reagan, complained that Justice O'Connor's formulation "is no limitation at all" but rather "is expressed only as an expectation."<sup>71</sup> Similarly, Professor Robert Post said the twenty-five year expectation "sounds more like a pious wish than a conclusion of law . . ."<sup>72</sup>

Justice Thomas's reading is impeached not only by the language Justice O'Connor used and the analysis of the rest of the Court; it also conflicts with the overall tone of Justice O'Connor's discussion of narrow tailoring. She

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<sup>66</sup> *Grutter*, 539 U.S. at 346 (Ginsburg, J., concurring) ("From today's vantage point, one may hope, but not firmly forecast, that over the next generation's span, progress toward nondiscrimination and genuinely equal opportunity will make it safe to sunset affirmative action."). Justice Ginsburg phrased her opinion in an exceedingly tactful manner, which did not presume to interpret the majority opinion but rather to express her own view, an approach perhaps intended to avoid offending Justice O'Connor.

<sup>67</sup> *Id.* at 386 (Rehnquist, C.J., dissenting) ("The Court suggests a possible 25-year limitation on the Law School's current program.").

<sup>68</sup> *Id.* at 387 (Rehnquist, C.J., dissenting) (criticizing Court for permitting race preferences "on a seemingly permanent basis").

<sup>69</sup> *Id.* at 394 (Kennedy, J., dissenting).

<sup>70</sup> *Id.*

<sup>71</sup> CHARLES FRIED, SAYING WHAT THE LAW IS 240 (2004); *see also* Taylor, *supra* note 8, at 9 (criticizing Justice O'Connor for twenty-five year prediction).

<sup>72</sup> Post, *supra* note 50, at 67 n.306.

emphasized flexibility and balancing in all other elements of narrow tailoring.<sup>73</sup> It would be odd if she celebrated those qualities regarding all other aspects of narrow tailoring but suddenly abandoned them regarding duration. If the Court intended to sunset race preferences in 2028, one would at least expect a clear statement to that effect. There is none.

The bottom line is that *Grutter* did not impose a twenty-five year deadline on the use of race-conscious admissions plans. Justice Thomas's construction of the twenty-five year reference as a bright line limit that admits no crossing rests on a rather tortured reading of the English language.

Although the twenty-five year timetable does not have the rigidity that Justice Thomas claimed, it also is not as pliable as Justice Ginsburg suggested. An expectation is not simply a hope.<sup>74</sup> One may hope something will happen without expecting it to occur.<sup>75</sup> In the context of her discussion, Justice O'Connor clearly hoped to dispense with race preferences by 2028, but she did not simply express a wish, as Justice Ginsburg no doubt would have preferred. Instead, she used the verb "expect," which implied that she also thought race preferences will disappear by then. Although four members of the Court suggested the Court's twenty-five year expectation was not a

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<sup>73</sup> *Grutter*, 539 U.S. at 334 (Admissions programs must be "flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant . . .") (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 317 (1978)); *id.* (race must be "used in a flexible, nonmechanical way"); *id.* (universities can use race "more flexibly"); *id.* at 336 ("[S]ome attention to numbers; alone does not transform 'flexible admissions system' into quota"); *id.* at 337 (race-conscious admissions programs "must remain flexible enough"); *id.* (policy is sufficiently "flexible"); *id.* (policy considers "all factors"); *id.* at 338 (Law School "gives substantial weight to diversity factors besides race"); *id.* (Law School "weighs many other diversity factors"); *id.* at 340 (Race considered as "one factor among many"); *id.* at 341 (race-conscious program may not "unduly harm" or "unduly burden" members of nonfavored groups); *id.* (Law School plan does not "unduly harm" whites).

<sup>74</sup> See, e.g., Amar & Caminker, *supra* note 50, at 542; Cordes, *supra* note 7, at 742 (arguing that Justice Ginsburg makes too little of twenty-five year expectation). Cf. Abramowicz & Stearns, *supra* note 50, at 1092 n.462 (O'Connor "may have wanted to send a signal stronger than a mere expression of hope"). But see Belsky, *supra* note 60, at 44 (referring to twenty-five years as "goal" for termination point); Erwin Chemerinsky et al., *Reaffirming Diversity: A Legal Analysis of the University of Michigan Affirmative Action Cases*, in THE CIVIL RIGHTS PROJECT 11, 17 (2003) (viewing statement as aspirational).

<sup>75</sup> E.g., I hope the Supreme Court cites this Article favorably although I do not expect that to occur. Of course, the opposite is also true—we may expect things to occur that we hope do not. For example, St. Louis Browns fans always expected the Browns to finish last in the American League, although each year they hoped for a surprise.

forecast,<sup>76</sup> it is hard not to understand the word as making a prediction about the future.<sup>77</sup>

Justice O'Connor did not, however, specifically say what should occur if, contrary to her hope and forecast, race preferences remain necessary in 2028 to produce the interests *Grutter* recognized. Proponents of race-conscious plans surely would have been happier had the Court simply talked generally about "duralional requirement[s]" and "logical end point[s]," as Justice O'Connor did throughout most of the first four paragraphs of the discussion of this topic without introducing the twenty-five year expectation.<sup>78</sup> It creates enough uncertainty to occasion speculation about the end of preferences.

### *C. Understanding the Twenty-five Year Expectation: Competing Rationales*

The Court's discussion of durational limits suggests a second inquiry that might shed light on the twenty-five year timetable. Why did the Court say it expected that race-conscious admissions will be unnecessary in twenty-five years? What considerations motivated the Court to articulate a twenty-five year expectation?

Two very different perspectives influence discussions of time limits. One approach focuses on the benefits of race-conscious admissions. It assigns priority to eliminating racial disparities in the distribution of societal resources. It believes that these programs should continue so long as they generate returns. It agrees that race preferences should be a temporary strategy, not a fixture of American life. Yet it would sunset them only when they were no longer needed.<sup>79</sup> Two different developments could produce

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<sup>76</sup> See *Grutter*, 539 U.S. at 346 (Ginsburg, J., concurring) ("From today's vantage point, one may hope, but not firmly forecast, that over the next generation's span, progress toward nondiscrimination and genuinely equal opportunity will make it safe to sunset affirmative action."); *id.* at 376 n.13 (Thomas, J., concurring in part, dissenting in part) ("I agree with Justice Ginsburg that the Court's holding that racial discrimination in admissions will be illegal in 25 years is not based upon a 'forecast.' I do not agree with Justice Ginsburg's characterization of the Court's holding as an expression of 'hope.'" (citation omitted)).

<sup>77</sup> See, e.g., Ronald Dworkin, *The Court and the University*, 72 U. CIN. L. REV. 883, 896 (2004) ("But she made plain that this expectation was not an automatic 'sunset' invalidation, but rather a prediction that by that time minority applicants would be sufficiently qualified on traditional criteria to produce a diverse student body without special programs, or that experimentation in various states would have discovered admissions techniques that produce adequate diversity without relying so explicitly on race.").

<sup>78</sup> *Grutter*, 539 U.S. at 342.

<sup>79</sup> See, e.g., *Grutter*, 539 U.S. at 344-46 (Ginsburg, J., concurring).

that point. First, race-conscious plans could become expendable if the performance gap between whites and disadvantaged minorities disappears so that a system of race-blind admissions produces a diverse class.<sup>80</sup> Second, race-conscious admissions could become expendable if institutions discover alternative feasible strategies to serve well the interests *Grutter* recognized. In any event, this perspective sees a colorblind constitution as an aspiration that can only be achieved if more disadvantaged minorities realize opportunity here. It is likely to accommodate race-conscious remedies so long as they are necessary to produce diversity.

Alternatively, others focus on the perceived costs of such programs. They favor imposing time limits on race-conscious remedies even before they become obsolete in order to minimize those costs. Some criticize race preferences for deviating from a system that allocates places based on individual merit rather than group identity. They believe race preferences create "a pervasive racial spoils system."<sup>81</sup> They worry that race-conscious admissions have an addictive quality that will entrench them long after their purpose has been fulfilled. This development would defeat the aspiration ultimately to make America "a single, unsegmented nation, where race did not matter."<sup>82</sup> For instance, Professor Charles Fried writes:

We have had another generation of racial classifications and preferences. A whole elite cadre depends on racial division for its constituency and its position. Justices Powell and Marshall agreed that a single, unsegmented nation, where race did not matter, was the goal. But if we continue indefinitely to divide ourselves by race, to make race legally dispositive in all sorts of contexts (with the ugly necessity of formally assigning

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<sup>80</sup> Transcript of Oral Argument, *supra* note 48, at 41. In oral argument, Maureen Mahoney, attorney for Bollinger in *Grutter*, expressed as another possibility that society might evolve to a point where diverse backgrounds might not produce different perspectives and accordingly, could be unimportant. She suggested "that we could reach a point in our society at which the experience of being a minority did not make such a fundamental difference in their lives, where race didn't matter so much that it's truly salient to the law school's educational mission." *Id.* at 42. This vision is a possibility, though a somewhat remote one. Yet the argument seems more relevant pre-*Grutter* than now. Since *Grutter* expanded the diversity rationale to include the shape of the society that campuses help produce, not simply campus demographics, race-conscious admissions could theoretically remain valid, say, to create openings for disadvantaged minorities in leadership positions, even after the experience of being a minority provided no important perspective for campus life.

<sup>81</sup> Taylor, *supra* note 8, at 91; see also *Grutter*, 539 U.S. at 371-74 (Thomas, J., concurring in part, dissenting in part) (arguing that race-conscious admissions causes harm); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 510-11 (1989) (racial preferences should not be form of racial politics).

<sup>82</sup> FRIED, *supra* note 71, at 239 (citation omitted).

individuals to particular racial groups), then the time will soon come—I hope it is not already here, I hope the entrenched interests have not become too strong—when this new form of racial segmentation will become permanent, that the ideal of each person’s being judged as an individual and not as a member of a group to which he is assigned by somebody’s “public policy” will no longer be possible.<sup>83</sup>

According to this perspective, sunset provisions are essential to prevent race preferences from becoming permanent entitlements. Under this approach, the end of racial preferences is not contingent upon their success in producing racially diverse campuses. Rather, an endpoint must be set to control the corrosive features of race preferences.

The twenty-five year timetable may reflect Justice O’Connor’s expectation that over that period the success of race-conscious admissions will render them expendable. Her closing words suggest this influence. She ended her discussion of durational limits by noting that twenty-five years had passed since *Bakke* approved some race-conscious admissions to produce campus diversity. “Since that time, the number of minority applicants with high grades and test scores has indeed increased. We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.”<sup>84</sup> The juxtaposition of the sentence celebrating a quarter-century of progress with the “expectation” sentence suggests that the prediction rested upon the past progress and her anticipation of future advances.<sup>85</sup> Although the Law School did not suggest that race-conscious plans would be obsolete in twenty-five years, it did argue that past progress gave grounds for optimism.<sup>86</sup> Justice O’Connor, quoting an obscure 1977 law review article by Nathaniel L. Nathanson and Casimir J. Bartnik,<sup>87</sup> stated

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<sup>83</sup> *Id.*

<sup>84</sup> *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003) (citation omitted).

<sup>85</sup> In this respect, Justice O’Connor may be viewed as more optimistic regarding history and future prospects than is Justice Ginsburg; *see also* Belsky, *supra* note 60, at 44–45.

<sup>86</sup> Transcript of Oral Argument, *supra* note 48, at 42:

While . . . I can’t say when that will happen, we certainly know that as a nation, we have made tremendous progress in overcoming intolerance. And we certainly should expect that that will occur with respect to minorities. . . . In *Bakke* itself, there were five votes to allow the University of California Davis to use a plan modeled on the Harvard plan. It’s been in effect for about 25 years. It has reaped extraordinary benefits for this country’s educational system.

<sup>87</sup> Nathaniel L. Nathanson & Casimir J. Bartnik, *The Constitutionality of Preferential Treatment for Minority Applicants to Professional Schools*, 58 CHI. BAR REC. 282, 293 (May–June 1977).

that “the rationale for programs of preferential treatment” is “their efficacy in eliminating the need for any racial or ethnic preferences at all.”<sup>88</sup> More than twenty-six years had passed since that statement appeared. Justice O’Connor’s decision to extend such preferences might suggest that she believed they work and perhaps will succeed by 2028. Moreover, Justice O’Connor twice linked the duration of race-conscious admissions to the interest they served.<sup>89</sup> This association also suggested that the duration of these programs should coincide with their utility in producing diversity.

At least two other members of the majority—Justices Ginsburg and Breyer—clearly did tie durational limits to achieving equality. They cited international sources that provide that race-conscious approaches should not continue once equal opportunity is achieved, implicitly endorsing them until that time.<sup>90</sup> Moreover, they saw “progress toward nondiscrimination and genuinely equal opportunity” as the predicate for sunseting affirmative action.<sup>91</sup> They implicitly believed that such programs should continue until equal opportunity is achieved.

It is tempting to conclude that Justice O’Connor suggested the twenty-five year schedule based upon her faith that social progress may render race-conscious plans unnecessary by then. The word choice implied this meaning and some commentators have so read it.<sup>92</sup> Yet she really offered little, if any, support for such a prognostication. She argued that during the quarter-century since *Bakke* “the number of minority applicants with high grades and test scores has indeed increased.”<sup>93</sup> She took cover by citing to the argument of the Law School’s counsel to that effect.<sup>94</sup> Even if true, the test is not whether gains have been made but whether such progress is likely to continue during the next generation at a pace which would obviate the need for race-conscious admissions. The Court offered no evidence to support

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<sup>88</sup> *Grutter*, 539 U.S. at 343 (quoting Nathanson & Bartnik, *supra* note 87).

<sup>89</sup> *See id.* at 342 (Racial classifications “may be employed no more broadly than the interest demands.”); *id.* at 343 (“We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.”).

<sup>90</sup> *See id.* at 344 (Ginsburg, J. concurring).

<sup>91</sup> *Id.* at 346.

<sup>92</sup> *See, e.g.,* Gabriel J. Chin, *Jim Crow’s Long Goodbye*, 21 CONST. COMMENT. 107, 108 (2004) (“Whatever the actual underlying rationale for this forecast, the Court’s prediction rests on the idea that within 25 years, a sufficiently racially diverse student body will be achieved through ordinary sorting and application processes.”); Taylor, *supra* note 8, at 91; Thernstrom, *supra* note 8, at 265.

<sup>93</sup> *Grutter*, 539 U.S. at 343.

<sup>94</sup> *Id.* During oral argument, the law school’s attorney stated that “there has not been enough progress to allow for meaningful numbers at this point, but there has been progress.” Transcript of Oral Argument, *supra* note 48, at 43.



such a conclusion. As will be discussed later, the data suggest little basis for such optimism. And most others believe the prediction is wildly optimistic.<sup>95</sup>

Alternatively, the twenty-five year timetable might reflect the Court's expectation that within that period other approaches will emerge to replace race-conscious admissions. Under this view, the twenty-five year period is not predicated upon a belief that without resort to race preferences campus diversity will simply occur by 2028. Rather, it assumes that race-neutral alternatives will emerge to replace race-conscious ones. Indeed, the Court stated that durational requirements "can be met by sunset provisions in race-conscious admissions policies and periodic reviews to determine whether racial preferences are still necessary to achieve student body diversity."<sup>96</sup> It then noted that some states are experimenting with race-neutral plans and suggests that others might learn from this experience. The juxtaposition of these ideas might suggest that racial preferences will become unnecessary because race-neutral plans might emerge.

Justice O'Connor would no doubt welcome the appearance of some race-neutral solution. Although she found that a compelling interest justified the use of race in *Grutter*, she clearly has misgivings about racial classifications. She has consistently argued that the Court must strictly scrutinize any public use of race. Yet her opinion gives little reason to suggest that she believes race-neutral means will soon supplant race-conscious approaches. In her earlier discussion she rejected the proposition that universities must exhaust "every conceivable race-neutral alternative"<sup>97</sup> or sacrifice excellence for diversity.<sup>98</sup> She earlier stated that the Law School must, in good faith, consider race-neutral alternatives,<sup>99</sup> but supported the School in rejecting all available options. She questioned the relevance of percentage plans to professional or graduate schools and noted that they were inconsistent with

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<sup>95</sup> See, e.g., DERRICK BELL, *SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM* 149 (2004) (criticizing Justice O'Connor's "optimistic estimate" as unfounded); Johnson, *supra* note 11, at 172 (describing skepticism that twenty-five years will "be long enough to eliminate the need for affirmative action at elite public universities . . ."); *id.* at 188 (criticizing view that affirmative action will be unnecessary in twenty-five years as "wrong on its face" absent "aggressive steps"); Taylor, *supra* note 8, at 91 ("Whether this was self-deception or just plain deception, the *Grutter* majority must have been aware of the overwhelming evidence that the racial academic gap is both enormous and growing.").

<sup>96</sup> *Grutter*, 539 U.S. at 342.

<sup>97</sup> *Id.* at 339.

<sup>98</sup> *Id.* ("Nor does it require a university to choose between maintaining a reputation for excellence or fulfilling a commitment to provide educational opportunities to members of all racial groups.").

<sup>99</sup> *Id.*

individualized review.<sup>100</sup> Her encouragement to draw upon “the most promising aspects of these race-neutral alternatives as they develop”<sup>101</sup> is not a confident affirmation that such plans will develop to supplant race-conscious ones.<sup>102</sup>

Alternatively, it may be that the Court suggested a twenty-five year period to ensure that race-conscious admissions do not become a permanent part of American life, an entitlement for disadvantaged minorities. “Enshrining a permanent justification for racial preferences would offend” the Equal Protection principle that “racial classifications, however compelling their goals, are potentially so dangerous that they may be employed no more broadly than the interest demands.”<sup>103</sup> Moreover, the Court quoted the Nathanson-Bartnik article lamenting the prospect that America could become “a quota-ridden society, with each identifiable minority assigned proportional representation in every desirable walk of life.”<sup>104</sup> Yet it seems unlikely that this factor alone motivated Justice O'Connor to articulate a twenty-five year expectation. The language she used in her punch line seems inconsistent with these considerations. One would not normally say that “we expect” race preferences “will no longer be necessary to further the interest approved today”<sup>105</sup> to express the idea that race preferences should not be entrenched. Moreover, her linkage of durational limits with “the interest approved today” and her acceptance of the Law School's commitment to terminate its plan “as soon as practicable”<sup>106</sup> seem to suggest that time limits should be set based on the benefits from race-conscious admissions, not their costs.

The Court may have viewed another twenty-five years as sufficient time for race-conscious admissions plans to demonstrate their efficacy. It may have been saying that if within twenty-five years affirmative action has not succeeded, America should accept that reality and move on. Indeed, the Court cited the Nathanson-Bartnik article for the proposition that “the acid test” to justify minority preferences “will be their efficacy in eliminating

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<sup>100</sup> *Id.* at 340.

<sup>101</sup> *Id.* at 342.

<sup>102</sup> See also *Grutter v. Bollinger*, 539 U.S. 306, 370 (2003) (Thomas, J., concurring in part, dissenting in part) (“The Court will not even deign to make the Law School try other methods, however, preferring instead to grant a 25-year license to violate the Constitution.”).

<sup>103</sup> *Id.* at 342.

<sup>104</sup> *Id.* at 342–43 (quoting Nathanson & Bartnik, *supra* note 87, at 293).

<sup>105</sup> *Id.* at 343.

<sup>106</sup> *Id.*

the need for any racial or ethnic preferences at all.”<sup>107</sup> Perhaps the Court was saying that fifty years—twenty-five years before and after *Grutter*—is enough time to allow race preferences to work. Justice Ginsburg seemed to infer some such message in the Court’s opinion. She pointed out in her concurrence that during part of the time since *Bakke* the law was unsettled regarding race-conscious admissions and that public school segregation was constitutional until only twenty-five years before *Bakke*.<sup>108</sup> Justice Ginsburg implied that twenty-five years more will not provide a fair test. Yet Justice O’Connor’s words seem a rather odd and indirect way to express the idea that twenty-five more years will be time enough to test the efficacy of race preferences.

Finally, the twenty-five year timetable may have had an instrumental purpose. Justice O’Connor may not have been confident that race preferences would soon succeed or that race-neutral alternatives are on the horizon. Rather, she may have wished to encourage decision-makers to act to make race-conscious admissions obsolete. Thus, her twenty-five year reference may have been designed to encourage universities to review their plans periodically,<sup>109</sup> a course she specifically recommended. She may have been suggesting a rough time limit for universities to consider in crafting their own plans. Or Justice O’Connor may have been signaling universities that they cannot forever rely on *Grutter* to support race-conscious admissions.<sup>110</sup>

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<sup>107</sup> *Id.* Nathanson & Bartnik also state: “At most [race-conscious admissions] are entitled to a reasonable trial period. If they serve their purposes well enough, they should disappear of their own accord. If they fail, they should be abandoned in favor of other alternatives.” Nathanson & Bartnik, *supra* note 87, at 293. Bollinger describes *Hopwood* and Proposition 209 as reflecting:

[T]he ascendancy of the perspective that the society had now done enough to correct for its past sins of slavery and discrimination, and, with the playing field now basically level, it was time to move on and to let the chips fall where they may in the meritocracy of college admissions and beyond.

Lee Bollinger, *A Comment on Grutter and Gratz v. Bollinger*, 103 COLUM. L. REV. 1588, 1590 (2003); Mark V. Tushnet, *The “We’ve Done Enough” Theory of School Desegregation*, 39 HOW. L.J. 767 (Spring 1996) (explaining *Missouri v. Jenkins*, 515 U.S. 70 (1995), as reflecting Court attitude that “we’ve done enough” regarding school desegregation).

<sup>108</sup> *Grutter v. Bollinger*, 539 U.S. 306, 344–45 (2003) (Ginsburg, J., concurring); see also Brief for Respondents, *supra* note 44, at 33 (arguing that “three decades of modest effort” should not suggest permanence of racial disparities).

<sup>109</sup> See Johnson, *supra* note 11, at 184 (time limits rational “to ensure periodic review” of programs); *id.* at 189–90 (discussing decision as means to stimulate periodic review).

<sup>110</sup> Amar & Caminker, *supra* note 50, at 550–51;

For instance, Professors Amar and Caminker believe the twenty-five year reference may represent Justice O'Connor's way to rebut any future reliance interest universities and minorities have on race-conscious admissions. The phrase may have been included to estop a future argument that such plans are entitled to continue based on societal reliance on them.<sup>111</sup> They argue:

Her embrace of diversity as a compelling state interest seems candid and whole-hearted, but her willingness to countenance explicit race-conscious action as a means to effectuate that interest seems tentative, presumably because of some constitutional injury she believes race consciousness inflicts. She appears unwilling to cut off such race consciousness cold turkey . . . but she wants by means of legal doctrine to bring society around to the point where soon we no longer need it. So she self-consciously approaches the next twenty-five years willing to tolerate a transitional state of constitutional affairs as we move slowly from where we are today to a state she would prefer, where we use means other than race consciousness to attain the desirable diversity (if any affirmative means remain necessary at all).<sup>112</sup>

Thus, they speculate that Justice O'Connor announced the sunset to deprive *Grutter* of ongoing precedential effect.<sup>113</sup> As Professor Neal Katyal has argued:

The Court said, in essence, that it did not want to give the University carte blanche for all time. This does not really appear to be a claim about a "logical stopping point" as such; rather, it appears to be one about the vitality of a Supreme Court opinion in the face of evolving circumstances.<sup>114</sup>

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Whatever "sunset" the Court had in mind for race-conscious admissions itself, it seems relatively clear that the precedential value of *Grutter*, in terms of establishing the constitutionality of race-conscious admissions, faces a twenty-five year sunset. Indeed, this might be the primary purpose of affirming the need for a logical end point and sunset provision, sending a message to colleges and universities that they cannot rely on *Grutter* indefinitely to support race-conscious admissions.

Cordes, *supra* note 7, at 747.

<sup>111</sup> See Amar & Caminker, *supra* note 50, at 549–50.

<sup>112</sup> *Id.* at 551.

<sup>113</sup> See also Katyal, *supra* note 10, at 1244.

<sup>114</sup> *Id.*

Under this argument, Justice O'Connor in essence "builds a self-destruct mechanism" into *Grutter* which will force universities to justify their use of race preferences in the future.<sup>115</sup>

It is certainly plausible to think that Justice O'Connor was sensitive to the danger that reliance interests would create a stare decisis insulation for race preferences. She, after all, was a co-author of the pivotal plurality opinion in *Planned Parenthood v. Casey*,<sup>116</sup> which identified reliance as a crucial determinant of stare decisis.<sup>117</sup> Moreover, a number of briefs argued that universities and law schools had relied on Justice Powell's *Bakke* opinion in fashioning their own programs.<sup>118</sup>

Yet this explanation is not entirely convincing. The words Justice O'Connor used do not preclude reasonable reliance on *Grutter*. After all, if Chief Justice Rehnquist viewed her discussion as "devoid of any reasonably precise time limit" and as a "possible" twenty-five year limit which permits the Law School to use race "on a seemingly permanent basis"<sup>119</sup> and Justice Ginsburg saw it as a hope, it is hard to insist that any reasonable person must understand it as a cutoff. If Justice O'Connor wanted to rebut reliance after 2028 she might have used a stronger formulation than simply voicing her expectation that race preferences would be unnecessary in twenty-five years.

Moreover, in some other contexts, where Justice O'Connor has presumably not cared for a precedent, she has followed it in part based on reliance interests. The most obvious example is, of course, *Casey*. There, Justice O'Connor did not seek to rebut reliance by creating a twenty-five year transition period. Why is it logical to think she was doing so here?<sup>120</sup>

In all likelihood, some combination of factors motivated Justice O'Connor.<sup>121</sup> Ultimately, the twenty-five year expectation may have

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<sup>115</sup> Cordes, *supra* note 7, at 742.

<sup>116</sup> *Planned Parenthood v. Casey*, 505 U.S. 833, 861–69 (1992).

<sup>117</sup> Amar & Caminker, *supra* note 50, at 550.

<sup>118</sup> See, e.g., Brief for Respondents at 19–20, *Grutter v. Bollinger*, 539 U.S. 306, 394 (2003) (No. 02-241); Brief of Harv. Univ. et al. as Amici Curiae Supporting Respondents at 8, *Grutter*, 539 U.S. 306 (No. 02-241).

<sup>119</sup> *Grutter*, 539 U.S. at 386–87 (Rehnquist, C.J., dissenting).

<sup>120</sup> But see Amar & Caminker, *supra* note 50, at 554 (distinguishing *Casey* and *Grutter* on grounds that *Casey* involved reliance on individual right where *Grutter* did not).

<sup>121</sup> This characteristic of her opinion is not surprising. On race-conscious admissions, as with many other issues, Justice O'Connor occupied a position somewhere near the center of the Court. She avoided the clearer, yet more polarizing, positions of those of Justices Scalia and Thomas who would ban all race preferences and those like Justices Stevens, Souter, Ginsburg, and Breyer who would be less suspicious of preferences benefiting minorities than those favoring whites. Her position sought to

reflected her attempt to accommodate her commitment to the compelling interests *Grutter* recognized with her discomfort with race preferences as a means. Justice O'Connor believed it important to emphasize that race preferences are not to be permanent. She also repeatedly tied the duration of race preferences to their efficacy in achieving the compelling interest they serve.<sup>122</sup> She reconciled her ambivalence by concluding that for now, and for a while longer, the compelling end justifies the controversial means. Justice O'Connor certainly reminded institutions that race-conscious admissions are transition devices and gave them incentive to consider weaning themselves from them. Having applied strict scrutiny to university uses of race in admissions in a deferential way, the twenty-five year expectation holds them accountable by probably requiring them to justify their use of race-conscious admissions by 2028, a quarter-century after *Grutter*, a half-century after *Bakke*. Requiring a justification in a new context is a far cry from commanding an end.

#### D. *Summing Up*

On balance, *Grutter* reflected an expectation that race-conscious admissions will be unnecessary by 2028 rather than a holding or a mere hope to that effect. The Court's language supported that conclusion as did Justice O'Connor's approach to narrow tailoring. Moreover, that reading seems to have reflected the view of much of the Court. Whereas only two justices labeled it a holding<sup>123</sup> and two a hope,<sup>124</sup> five seemed to view it as an expectation.<sup>125</sup>

In a sense, of course, this conclusion leaves us somewhat at sea. The real question is what is the significance of concluding that *Grutter*'s twenty-five year timetable is an expectation, not a holding or a hope? We could well understand that a holding would end race preferences in 2028 and that a hope would respond to failure with no consequence but disappointment. The impact of a failed expectation is less certain. Justice O'Connor did not say what should happen in 2028 if race preferences remain necessary to achieve the interests the Court identified as compelling, although she did provide some pretty good clues. She repeatedly linked time limits to the necessity to

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accommodate some of the competing principles that influence those to her right and those to her left. As such, her position was more nuanced.

<sup>122</sup> *Grutter*, 539 U.S. at 342 ("employed no more broadly than the interest demands"); *id.* at 343 (race preferences unnecessary in 25 years "to further the interest approved today").

<sup>123</sup> Justices Thomas and Scalia.

<sup>124</sup> Justices Ginsburg and Breyer.

<sup>125</sup> Justices O'Connor, Stevens, Souter, Kennedy, and Chief Justice Rehnquist.

achieve interests *Grutter* recognized as compelling.<sup>126</sup> The formulations she used imply that race preferences should continue beyond twenty-five years if they remain necessary to achieve the interest recognized.

To some extent, of course, constitutional holdings always are uncertain. As a general rule, the Court is more likely to review its constitutional precedents than it is its statutory interpretations. The twenty-five year expectation increases this uncertainty and will no doubt create some momentum to transition away from race preferences regardless of whether their work is done or suitable alternatives present themselves. On the other hand, constitutional precedents are presumptively followed absent some convincing reason to depart from them. Absent a clear statement to the contrary, *Grutter* should receive the same deference.

### III. THE LEGITIMACY OF TIME LIMITS

Justice O'Connor introduced the idea of durational limits in the context of interpreting the Constitution, specifically the Equal Protection Clause. Ultimately, then, the legitimacy of durational limits turns on how we practice constitutional interpretation, how we understand the Equal Protection Clause, and on questions regarding institutional practice and competence. The general idea that race preferences should be subject to durational limits is legitimate. It comports with constitutional ideas associated with race preferences and is consistent with precedent. The twenty-five year expectation is, however, problematic.

#### A. *Living Constitution vs. Static Constitution*

The concept of durational limits rests upon the premise that the meaning of the Equal Protection Clause can vary with changing contemporary reality. Time limits deem race preferences constitutional for some period, but unconstitutional thereafter. Someone who believes in a static Constitution with a fixed, unchanging meaning would resist that idea. For instance, Justice Thomas's embrace of the twenty-five year time limit is clearly opportunistic. He believes that race preferences are unconstitutional now, but as a fallback

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<sup>126</sup> See *Grutter*, 539 U.S. at 342 (race preferences should be "employed no more broadly than the interest demands"); *id.* (calling for periodic reviews "to determine whether racial preferences are still necessary"); *id.* at 343 (expressing satisfaction that Michigan Law School will terminate preferences "as soon as practicable"); *id.* (expecting in twenty-five years race preferences "will no longer be necessary to further the interest approved today").

position accepts the idea that they will be unconstitutional in 2028.<sup>127</sup> He contests the notion, which is central to durational limits, that the Constitution's meaning can change. He argued "that the Constitution means the same thing today as it will in 300 months."<sup>128</sup> In his view, the Constitution will bar race preferences in twenty-five years because it does so today.

Although Justice Powell's constitutional methodology generally resembled that of Justice O'Connor more than that of Justice Thomas, Justice Powell sounded some similar notes in criticizing race preferences in *Bakke*. He rejected the idea of benign discrimination, in part because "hitching the meaning of the Equal Protection Clause to these transitory considerations" would imply a constitutional principle "that judicial scrutiny of classifications touching on racial and ethnic background may vary with the ebb and flow of political forces."<sup>129</sup> Moreover, he thought "the mutability of [the] constitutional principle, based upon shifting political and social judgments, undermines the chances for consistent application of the Constitution from one generation to the next, a critical feature of its coherent interpretation."<sup>130</sup> In essence, Justice Powell distanced himself in *Bakke* from the notion that the Equal Protection Clause might tolerate race preferences at some times but not others.

Conversely, someone who subscribes to a notion of a living Constitution might more comfortably accept the idea that the Equal Protection Clause could allow race preferences for a period of time but ultimately proscribe them. "That which is constitutional now may cease to be constitutional then, if facts and circumstances have changed," argued one brief in support of race preferences in *Bakke*.<sup>131</sup> This idea coincides with the basic premise of a living Constitution—that the Constitution must adapt to changing circumstances.

This Article is not the occasion to present a full scale discussion of the relative merits of a static versus a living Constitution. That is a subject for study in itself.<sup>132</sup> Suffice it to say that in 1819 Chief Justice Marshall

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<sup>127</sup> *Id.* at 375 (Thomas, J., concurring in part, dissenting in part) ("While I agree that in 25 years the practices of the Law School will be illegal, they are, for the reasons I have given, illegal now."); *see also id.* at 370 (accusing Court of giving the law school "25-year license to violate the Constitution").

<sup>128</sup> *Grutter*, 539 U.S. at 351.

<sup>129</sup> *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 298 (1978).

<sup>130</sup> *Id.* at 299.

<sup>131</sup> *See, e.g.*, Brief of Colum. Univ. et al. as Amici Curiae Supporting Respondents at 33, *Bakke*, 438 U.S. 265 (No. 76-811).

<sup>132</sup> *See generally* Arthur S. Miller, *Notes on the Concept of the "Living" Constitution*, 31 GEO. WASH. L. REV. 881 (1963).



articulated the basic vision behind the living Constitution. He argued that the Constitution was “intended to endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs.”<sup>133</sup> He thought the Constitution was intended to accommodate unforeseen exigencies to allow the republic it established to succeed.<sup>134</sup> Accordingly, each generation must enjoy some latitude to interpret constitutional language to handle contemporary problems. A century later, Justice Oliver Wendall Holmes expressed a similar sentiment in *Missouri v. Holland*.<sup>135</sup> He wrote:

[W]hen we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago.<sup>136</sup>

*Brown* embraced that premise. The Court refused to “turn the clock back to 1868 when the [Fourteenth] Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written.”<sup>137</sup> Instead, the Court concluded that it “must consider public education in...light of its full development and its present place in American life throughout the Nation.”<sup>138</sup> The premise behind the Court’s treatment was, of course, that the Constitution might impose different constraints on state government in 1954 than it had at earlier times.

The concept of a “living Constitution” has been the dominant vision in American jurisprudence. Most members of the *Grutter* Court accepted some idea of a living Constitution as applied to the text’s general language. The majority applied that notion in *Grutter* by including the durational

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<sup>133</sup> *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819) (emphasis omitted).

<sup>134</sup> *Id.*

<sup>135</sup> *Missouri v. Holland*, 252 U.S. 416 (1920).

<sup>136</sup> *Id.* at 433.

<sup>137</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483, 492 (1954).

<sup>138</sup> *Id.* at 492–93.

requirement. Justice Kennedy has embraced such a view in other contexts<sup>139</sup> as did Chief Justice Rehnquist, though in a much more modest form.<sup>140</sup>

To be sure, durational limits as applied to race preferences represent an unorthodox application of living Constitution theory. They project that ultimately the Constitution will mean something different ("race preferences are unconstitutional") than what it means today ("narrowly tailored race preferences are constitutional to serve a compelling interest"). Generally speaking, Courts deploy the living Constitution approach while looking back in time to justify present-day departures from earlier precedent. In *Grutter*, Justice O'Connor incorporated the living Constitution premise, arguably, to suggest that the Constitution would mean something different in 2028 than it does now. This distinction reflects a difference in judicial technique and vantage point, but a commitment to the living Constitution premise.

### B. Anticlassification vs. Antisubordination: Color-Blind Constitution

The legitimacy of durational limits also turns on how the Equal Protection Clause is understood. Two prominent theories compete in debates regarding it. Some believe the Clause prohibits racial classifications. Someone who understands the Clause as a strict anticlassification provision would regard all race preferences as constitutionally offensive. This view does not distinguish between racial classifications that burden and those that benefit disadvantaged minorities. Justice Scalia, for instance, wrote that "[t]he Constitution proscribes government discrimination on the basis of race, and state-provided education is no exception."<sup>141</sup> Justice Thomas agreed. "The Constitution abhors classifications based on race, not only because those classifications can harm favored races or are based on illegitimate motives, but also because every time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all,"<sup>142</sup> he wrote.

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<sup>139</sup> See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 578–79 (2003) (describing evolving nature of due process); *U.S. v. Lopez*, 514 U.S. 549, 579–83 (1995) (describing evolving nature of Commerce Clause).

<sup>140</sup> See William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 694 (1976).

<sup>141</sup> *Grutter v. Bollinger*, 539 U.S. 306, 349 (2003).

<sup>142</sup> *Id.* at 353; *Gratz v. Bollinger*, 539 U.S. 244, 281 (2003) (Thomas, J., concurring) ("I would hold that a State's use of racial discrimination in higher education admissions is categorically prohibited by the Equal Protection Clause."); see also *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 294–95 (1978) (Justice Powell arguing against reading Equal Protection Clause to impose different standards for whites and blacks).

Alternatively, others view the Equal Protection Clause as enjoining the subjugation of racial minorities, not racial classification. They “distinguish between policies of exclusion and inclusion.”<sup>143</sup> Thus, Justice Ginsburg argued that “[a]ctions designed to burden groups long denied full citizenship stature are not sensibly ranked with measures taken to hasten the day when entrenched discrimination and its aftereffects have been extirpated.”<sup>144</sup> Someone who understands the Clause as addressing racial subordination might be willing to accept benevolent race preferences for a longer period of time. As Justice Blackmun put it in his *Bakke* opinion, “[i]n order to get beyond racism, we must first take account of race.”<sup>145</sup>

The debate regarding race-conscious admissions is often fought over the related concept of a color-blind Constitution. Some notion of a color-blind Constitution has intrinsic and probably wide appeal. In other words, most at least believe that absent some important reason, government should not distribute benefits and burdens based on race. A belief that a color-blind Constitution is a contemporary constitutional imperative would cause one to oppose all racial preferences now.<sup>146</sup> Conversely, a view that the color-blind concept is simply aspirational might countenance race preferences for a period to remedy disparities. Justice Blackmun’s *Bakke* opinion well illustrated this disposition. He wrote:

I yield to no one in my earnest hope that the time will come when an “affirmative action” program is unnecessary and is, in truth, only a relic of the past. I would hope that we could reach this stage within a decade at the most. But the story [in] *Brown v. Bd. of Educ.*, decided almost a quarter of a century ago, suggests that that hope is a slim one. At some time, however, beyond any period of what some would claim is only transitional inequality, the United States must and will reach a stage of maturity where action along this line is no longer necessary. Then persons will be regarded as persons,

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<sup>143</sup> *Gratz*, 539 U.S. at 301 (Ginsburg, J., dissenting); see, e.g., Kathleen Sullivan, *After Affirmative Action*, 59 OHIO ST. L.J. 1039, 1048 (1998) (interpreting Equal Protection Clause as embodying anticaste principle); Randall Kennedy, *Persuasion and Distrust: A Comment on the Affirmative Action Debate*, 99 HARV. L. REV. 1327, 1334–37 (1986) (arguing against color-blind theory of Equal Protection Clause).

<sup>144</sup> *Gratz*, 539 U.S. at 301.

<sup>145</sup> *Bakke*, 438 U.S. at 407.

<sup>146</sup> See, e.g., *Grutter*, 539 U.S. at 378 (Thomas, J., concurring in part, dissenting in part) (“Our Constitution is color-blind, and neither knows nor tolerates classes among citizens.”); *id.* at 354 n.3 (Equal Protection Clause “renders the color of one’s skin constitutionally irrelevant to the Law School’s mission.”).

and discrimination of the type we address today will be an ugly feature of history that is instructive but that is behind us.<sup>147</sup>

A majority on the *Grutter* Court believed that the Constitution precludes, or treats as suspect, all racial classifications.<sup>148</sup> They would not distinguish racial classifications which harm, or help, minorities; malevolent and benevolent discrimination were reviewed under the same standard. Justices Scalia and Thomas adopted a strict rule against racial classifications. They declared virtually all uses of race unconstitutional.<sup>149</sup> Chief Justice Rehnquist,<sup>150</sup> and Justices Kennedy<sup>151</sup> and O'Connor applied a more lenient anticlassification principle. They thought that all racial classifications should be subject to strict scrutiny but all believed, to varying degrees, that some narrowly tailored uses of race might be compelling enough to accept. "Not every decision influenced by race is equally objectionable,"<sup>152</sup> wrote Justice O'Connor in *Grutter*. "[S]trict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decision-maker for the use of race in that particular context."<sup>153</sup> Justice O'Connor was more likely than Chief Justice Rehnquist or Justice Kennedy to find a compelling reason to justify use of a racial classification to benefit a disadvantaged minority.

Although a narrow court majority associated the Equal Protection Clause with some version of the anticlassification principle, the more compelling evidence suggests that the Clause prohibits racial subjugation, not racial classification. Contemporaneous understandings of the Clause so understood it; in *The Slaughter House Cases*, for instance, Justice Miller argued that the Fourteenth Amendment had as its "one pervading purpose" the protection of

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<sup>147</sup> *Bakke*, 438 U.S. at 403 (citation omitted); see also *id.* at 336 (Brennan, J., concurring in part, dissenting in part) (rejecting idea of color-blind Constitution).

<sup>148</sup> See, e.g., *Grutter*, 539 U.S. at 326 (all racial classifications subject to strict scrutiny).

<sup>149</sup> See, e.g., *id.* at 349 (Scalia, J., concurring in part, dissenting in part) ("The Constitution proscribes government discrimination on the basis of race . . ."); *id.* at 368 (Thomas, J., concurring in part, dissenting in part) ("What the Equal Protection Clause does prohibit are classifications made on the basis of race.").

<sup>150</sup> *Id.* at 379–80 (calling for strict scrutiny but criticizing Justice O'Connor's review as too deferential).

<sup>151</sup> Justice Kennedy adopted a less categorical formulation than did Justices Scalia and Thomas. He wrote, "The Constitution cannot confer the right to classify on the basis of race even in this special context absent searching judicial review." *Id.* at 395.

<sup>152</sup> *Id.* at 327.

<sup>153</sup> *Grutter v. Bollinger*, 539 U.S. 306, 327 (2003).

African Americans.<sup>154</sup> Justice Harlan's classic dissent in *Plessy v. Ferguson* argued that under the Constitution "there is in this country no superior, dominant, ruling class of citizens. There is no caste here."<sup>155</sup> To be sure, he also said that "[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens."<sup>156</sup> Yet he invoked the color-blind metaphor in a context in which antisubjugation rhetoric dominated. Color-blind interpretation was an instrument to preclude subordination of minority races.

*Brown* represents the modern understanding of the Clause. Significantly, the Court did not use anticlassification language in *Brown*. Instead, it posed, and answered, the question before it in terms which made clear its reliance on the antisubordination rationale. It asked whether segregation in public schools "deprive[s] the children of the minority group of equal educational opportunities?"<sup>157</sup> The answer was that racial segregation "generates a feeling of inferiority [in minority children] as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."<sup>158</sup> *Plessy* denied that racial classification connoted subordination of blacks.<sup>159</sup> *Brown* made clear that racial subordination was the real target of the Equal Protection Clause by rejecting *Plessy*'s contrary message.<sup>160</sup>

To be sure, *Bolling v. Sharpe* did state that "[c]lassifications based solely upon race must be scrutinized with particular care, since they are contrary to our traditions and hence constitutionally suspect."<sup>161</sup> Putting aside the historical inaccuracy of the statement that racial classifications violated American traditions, *Bolling*'s use of anticlassification rhetoric does not detract from the fact that *Brown* saw the antisubjugation rationale as central. *Brown* was the leading case and it clearly relied on the antisubordination theory. Moreover, *Bolling* is not really inconsistent with that orientation. The sentence from *Bolling* quoted above simply suggested that racial classifications are suspicious and must be scrutinized with care because they tend to reflect the effort of a dominant race to subordinate a minority or weaker race. *Bolling* did not say that racial classifications were always unconstitutional, an orientation that itself undermined the anticlassification rationale. Instead, it said only that such classifications needed to be

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<sup>154</sup> The Slaughter House Cases, 83 U.S. 36, 71 (1873).

<sup>155</sup> *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896).

<sup>156</sup> *Id.*

<sup>157</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

<sup>158</sup> *Id.* at 494.

<sup>159</sup> *Plessy*, 163 U.S. at 551.

<sup>160</sup> *Brown*, 347 U.S. at 494-95.

<sup>161</sup> *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) (citing *Korematsu v. United States*, 317 U.S. 329 (1945)).

examined, presumably to determine whether they involved subjugation. Professor Reva B. Siegel has recently demonstrated that in the years following *Brown*, Equal Protection was associated with the antisubordination rationale.<sup>162</sup>

The notion of a color-blind Constitution is, as Professor Paul Freund reminded, a "constitutional metaphor," not a constitutional text.<sup>163</sup> It reflects an aspiration for our society. But should our Constitution be color-blind before our society is? Past discrimination, no doubt, has played a significant role in reducing the pool of African Americans and Native Americans with the most competitive test scores and grade point averages. It would be anomalous if race, having been used to deny them access, could not also be used in some fashion to afford them fair opportunity.<sup>164</sup>

Racial classifications have an ignominious past but they have proved dangerous when those with political power have oppressed racial and other minorities. The same dangers do not exist when a majority extends a benefit to a minority. Professor John Hart Ely pointed out:

There is no danger that the coalition that makes up the white majority in our society is going to deny to whites generally their right to equal concern and respect. Whites are not going to discriminate against all whites for reasons of racial prejudice, and neither will they be tempted generally to underestimate the needs and deserts of whites relative to those, say, of blacks or to overestimate the costs of devising a more finely tuned classification system that would extend to certain whites the advantages they are extending to blacks. The function of the Equal Protection Clause . . . is largely to protect against substantive outrages by requiring that those who would harm others must at the same time harm themselves—or at least widespread elements of the constituency on which they depend for reelection. The argument does not work the other way around, however: similar reasoning supports no insistence that our representatives cannot hurt themselves, or the majority on whose support they depend, without at the same time hurting others as well. Whether or not it is more blessed to give than to receive, it is surely less suspicious.<sup>165</sup>

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<sup>162</sup> Reva Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470, 1472–73 (2004).

<sup>163</sup> PAUL A. FREUND, ON LAW AND JUSTICE 45 (1968).

<sup>164</sup> See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 387 (1978) (Marshall, J. arguing that because constitutional interpretation once allowed racial barriers it should not prohibit remedying the problems caused by those barriers).

<sup>165</sup> JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 170–71 (1980); see Brief of Colum. Univ. et al. as Amici Curiae Supporting Petitioner at 27, *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (No. 76-811):

The antistatutory vision is consistent with some general notion of durational limits. Indeed, many who champion race preferences make clear that they view them as transitory devices.<sup>166</sup> The antistatutory rationale would, however, suggest that time not be called until race preferences were unnecessary to produce diversity and opportunity. Until that time, the Clause will not have fulfilled its mission of correcting past subjugation of certain minority groups. *Grutter*'s treatment of time limits is consistent with the antistatutory rationale if Justice O'Connor's twenty-five year expectation is contingent upon race-conscious admissions being unnecessary to produce diversity. If Justice O'Connor's twenty-five year expectation would sunset race preferences before they are unnecessary, its legitimacy is contestable.

Such a twenty-five year limit could rest on antistatutory considerations that draw from the anticlassification rationale. The concern that Professor Fried and others express about the possible entrenchment of race preferences borrows from the anticlassification, color-blind version of the Equal Protection Clause. They fear that absent some relatively brief durational limit, race preferences will become permanent, and accordingly impede efforts to build a color-blind society. For reasons articulated below, this argument is unpersuasive. Moreover, it conflicts with the antistatutory rationale that furnishes the best account of the Equal Protection Clause.

### C. Judicial Precedent

The legitimacy of durational limits turns in part on how judicial precedent has treated them. It is easier to accept the constitutional legitimacy of durational limits if such limits have been traditionally applied.

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Special treatment based on race touches sensitive nerves. But the reason for this is the long tragic history of attention to race for the purpose of discriminating *against* blacks and other minorities. The problem of admissions programs designed to augment the number of minority students involves delicate issues. But it is not the same as *discrimination against minorities*, and no amount of rhetoric can make it the same.

*Id.*

<sup>166</sup> See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 344–45 (2003) (Ginsburg, J., concurring); *Bakke*, 438 U.S. at 403 (Blackmun, J.); WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS* 289 (1998) (Brief for the Ass'n of Am. Law Schools Amicus Curiae in Support of Petitioner at 26, *Bakke*, 438 U.S. 265 (No. 76-811) ("But when the need which brought the special admissions programs into being disappears they will be terminated.")).

The idea that race preferences are a temporary strategy is not a new concept. *Bakke* did not impose a time limit requirement but the Court considered the issue. University of California at Davis itself argued that race-sensitive admissions would be temporary. Its brief stated:

Color-conscious special-admissions programs are not viewed as a permanent fixture of the admissions landscape. The underlying philosophy of programs like the one at Davis is that they will eliminate the need for themselves and then disappear. The theory of the programs envisions that the extending of an opportunity for admission to the most capable minority students in this era will render unnecessary any reliance on special-admissions for ensuing generations.<sup>167</sup>

In response, *Bakke* complained that Davis "has set no time limit on the quota and during the eight years the program has been in operation, has made no change in the allotment of places."<sup>168</sup>

During the Supreme Court's conference to discuss *Bakke*, Justice Stevens commented, "Affirmative action programs have performed a fine service, but they ought to be *temporary*."<sup>169</sup> Justice Powell apparently agreed. When Justice Stevens opined that such preferences might be needed for only a few more years, Justice Marshall asserted they would be required for another century. Justice Marshall's pessimistic prophecy may have ended any chance that Justices Powell and Stevens would join an opinion broadly endorsing race preferences but for a brief period. Justice Powell "recoiled from the

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<sup>167</sup> Brief for Petitioner at 42-43, *Bakke*, 438 U.S. 265 (No. 76-811); *see also* Brief of Colum. Univ. et al. as Amici Curiae Supporting Petitioner, *supra* note 165, at 33.

One of the very purposes of taking minority status into account in admissions programs is to speed the time when that is no longer necessary, when applicants from all races and ethnic groups will have overcome the handicaps of previous generations of prejudice and will be able to compete for admission to selective educational institutions on terms nearly enough equal that special efforts will not be needed in order to acquire sufficiently diverse and representative student bodies. When the time comes, programs like that at Davis and other programs, both similar and distinguishable, all over the country will presumably be terminated. If not, when the need for such programs has ended, this Court can take a fresh look at them.

*Id.*; Brief for the Ass'n of Am. Law Schools as Amicus Curiae Supporting Petitioner, *supra* note 166, at 26 ("premise of these special admissions programs is that, in time, they will disappear. They are essentially a transitional device . . .").

<sup>168</sup> Brief for Respondent, *supra* note 44, at 34 n.29.

<sup>169</sup> THE SUPREME COURT IN CONFERENCE (1940-1985): THE PRIVATE DISCUSSIONS BEHIND NEARLY 300 SUPREME COURT DECISIONS 740 (Del Dickson ed., 2001).



prospect of generation upon generation of racial quotas,”<sup>170</sup> Dean John C. Jeffries, Jr., his biographer, asserts. Justice Blackmun ultimately voiced the hope that such programs might last for a decade,<sup>171</sup> a schedule which would have ended them in 1988. Justice Blackmun presciently viewed that hope as “a slim one.”<sup>172</sup> The other justices did not explicitly discuss the topic in their opinions. Justice Brennan, in his concurrence, which Justices White, Marshall, and Blackmun joined, hinted that race preferences should be limited, although the period required might be long. They agreed with Justice Powell that the Harvard plan would be constitutional “at least so long as the use of race to achieve an integrated student body is necessitated by the lingering effects of past discrimination.”<sup>173</sup> Presumably, race preferences would be obsolete when no longer required by these effects.

In *Bakke*, Justice Powell recognized campus diversity as a compelling reason for race-conscious admissions plans but did not require that such plans have a durational limit to be narrowly tailored. As previously noted, Justice Powell expressed misgivings about the prospect that the meaning of the Equal Protection Clause could change, a sentiment inconsistent with durational limits. In one sense, however, his approach implicitly limited the duration of such plans. Justice Powell rejected the argument of four of his colleagues<sup>174</sup> who urged that remedying past societal discrimination justified race-conscious admissions. Presumably, if a school could use race-conscious admissions to remedy societal discrimination it could do so until the remedy eliminated the injury. The harm from past societal discrimination was potentially enormous, and accordingly would require race-conscious remedies in perpetuity. Recognition of this rationale as a compelling interest would have justified race-conscious remedies without limit. Indeed, in a recent article, Dean Jeffries argued that Justice Powell rejected the Brennan-White-Marshall-Blackmun position because he “saw little prospect that the compensatory rationale would place any meaningful limit on the duration of such preferences.”<sup>175</sup> Justice Powell viewed “affirmative action as a transition, a short-term departure from the ideal of color-blindness justified

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<sup>170</sup> JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 487 (2001). According to Dean Jeffries, Justice Powell’s law clerk thought “things might have gone differently had Marshall predicted ten years rather than one hundred.” *Id.*

<sup>171</sup> *Bakke*, 438 U.S. at 403.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.* at 326 n.1 (Brennan, J., concurring in part).

<sup>174</sup> *Id.* at 307–10 (rejecting arguments of Justices Brennan, White, Marshall, and Blackmun).

<sup>175</sup> John C. Jeffries, Jr., *Bakke Revisited*, 2003 SUP. CT. REV. 1, 6–7.

only by pressing necessity.”<sup>176</sup> Allowing it to continue “until all effects of past societal discrimination had been eliminated might mean they would last forever.”<sup>177</sup> The diversity rationale, Dean Jeffries argued, allowed Justice Powell to reach a practical accommodation that continued to make elite institutions available to disadvantaged minorities without creating a system of permanent entitlements.<sup>178</sup>

The Court had previously emphasized durational limits as an important element of affirmative action programs. Two years after *Bakke*, Justice Powell made explicit his view that durational limits were relevant. In *Fullilove v. Klutznick*,<sup>179</sup> the Court upheld a federal statutory provision requiring that at least ten percent of certain federal funds for government contracts be paid to minority business enterprises. Justice Powell noted that “the planned duration of the remedy” was relevant in reviewing race-conscious hiring remedies.<sup>180</sup> He emphasized that the set-aside of federal public works funds for minority businesses, which was at issue in *Fullilove*, was not “permanent . . . The temporary nature of this remedy ensures that a race-conscious program will not last longer than the discriminatory effects it is designed to eliminate.”<sup>181</sup>

In subsequent cases, various members of the Court considered the temporal duration of affirmative action plans as a relevant criterion to assess. In *Wygant v. Jackson Board of Education*,<sup>182</sup> Justice Powell, speaking for four justices,<sup>183</sup> rejected the applicability of a role model theory to justify a race-conscious layoff scheme in part because it “has no logical stopping point.”<sup>184</sup> On the contrary, it would allow the School Board to use race-conscious hiring and layoff practices “long past the point required by any legitimate remedial purpose.”<sup>185</sup> Justice Marshall, as well as Justices Brennan and Blackmun, disagreed with the Court’s resolution of the case, but also

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<sup>176</sup> *Id.*

<sup>177</sup> *Id.* at 7.

<sup>178</sup> *Id.* at 6.

<sup>179</sup> *Fullilove v. Klutznick*, 448 U.S. 448 (1980).

<sup>180</sup> *Id.* at 510 (Powell, J. concurring).

<sup>181</sup> *Id.* at 513. In *United Steelworkers of America v. Weber*, 443 U.S. 193, 216 (1979), Justice Blackmun concurred in upholding under Title VII a private collective bargain agreement to recover for black employees fifty percent of the places in a training program because it “operates as a temporary tool for remedying past discrimination.” He took solace in the limited duration of the program. *Id.*

<sup>182</sup> *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986) (plurality opinion).

<sup>183</sup> Chief Justice Burger, Justices Rehnquist and O’Connor, and himself.

<sup>184</sup> *Wygant*, 476 U.S. at 275 (plurality opinion).

<sup>185</sup> *Id.*

viewed durational considerations as relevant to the narrow tailoring inquiry. They thought the race-sensitive layoff plan was “narrow in the temporal sense” because of its anticipated demise “when remedial measures are no longer required.”<sup>186</sup>

The following year, in *United States v. Paradise*,<sup>187</sup> the Court upheld as an interim measure a one-black-for-one-white requirement for state trooper promotions in Alabama’s Department of Public Safety. The remedy addressed the Department’s long history of employment discrimination against blacks. In essence, the one-for-one promotion quota was to continue until the state trooper force was 25% at all levels, the number of blacks in the relevant labor market.<sup>188</sup> Justice Brennan’s plurality opinion frequently cited the duration of the remedy as a factor in assessing the propriety of an affirmative action remedy.<sup>189</sup> Similarly, in a contemporaneous case, Justice O’Connor argued that any “deviation from the norm of equal treatment of all racial and ethnic groups” must be “a temporary matter, a measure taken in the service of the goal of equality itself.”<sup>190</sup> Finally, in *Adarand Constructors, Inc. v. Peña*,<sup>191</sup> Justice O’Connor criticized the lower court for not considering “whether the program was appropriately limited such that it ‘will not last longer than the discriminatory effects it is designed to eliminate.’”<sup>192</sup>

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<sup>186</sup> *Id.* at 309 (Marshall, J., dissenting) (Justice Brennan and three colleagues attaching significance to the “temporary” nature of a race-conscious plan to remedy past discrimination.) *See also* *Local 28 of Sheet Metal Workers Int’l. v. EEOC*, 478 U.S. 421, 479 (1986) (Brennan and three colleagues upholding race-conscious remedy as “temporary measures” which will “terminate” when goal reached and courts determine remedy unnecessary to address past discrimination); *id.* at 487 (Powell, J. concurring) (stating importance of limited duration for race preferences).

<sup>187</sup> *United States v. Paradise*, 480 U.S. 149 (1987).

<sup>188</sup> *Id.* at 179.

<sup>189</sup> *See, e.g., id.* at 171 (“flexibility and duration of the relief”); *see also id.* at 153 (“interim measure”); *id.* at 156 (“It is a temporary remedy that seeks to spend itself as promptly as it can . . .”) (quoting *NAACP v. Allen*, 493 F.2d 614, 621 (1974)); *id.* at 163 (lower court imposed remedy “‘for a period of time’” and highlighted “temporary nature” of relief); *id.* at 178 (one-for-one remedy is “ephemeral”) (remedy was “temporary in application”); *id.* at 180 (temporary remedy like imposition of end date); *id.* at 182 (remedy “temporary”); *id.* at 183 (remedy “so limited in scope and duration”); *id.* (situation is “only temporary”); *id.* at 185 (remedy is “temporary”); *id.* at 187 (Powell, J. concurring) (“planned duration of the remedy”).

<sup>190</sup> *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 510 (1989).

<sup>191</sup> *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

<sup>192</sup> *Id.* at 237–38 (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 513 (1980)).

Although the Court never held prior to *Grutter* that race preferences had to be time limited,<sup>193</sup> the decisions cited above represented the views of a range of justices who applied criteria so suggesting. Moreover, these judicial statements are reflected in utterances of various supporters of race preferences.<sup>194</sup> President Clinton in a major policy statement on affirmative action in 1995 endorsed a vague durational limit:

[A]ffirmative action should not go on forever. It should be changed now to take care of those things that are wrong, and it should be retired when its job is done. I am resolved that that day will come. But the evidence suggests, indeed, screams that that day has not come.<sup>195</sup>

In a memorandum on affirmative action issued that same day, President Clinton directed that any governmental affirmative action program "must be eliminated or reformed if it . . . continues even after its equal opportunity purposes have been achieved."<sup>196</sup> Indeed, as the Court pointed out in *Grutter*, Michigan Law School conceded that "race-conscious programs must have reasonable durational limits."<sup>197</sup>

Yet most of the cases are distinguishable from *Grutter* in one respect. Virtually every case involved the use of race-conscious criteria to remedy past discrimination.<sup>198</sup> In *Bakke*, for instance, Davis justified its race-conscious sixteen place 'set-aside largely to remedy past societal discrimination. Justice Blackmun, as well as Justices Brennan, White, and Marshall endorsed it on that basis, not to produce campus diversity. A requirement that "all governmental use of race must have a logical end

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<sup>193</sup> See Brief of Harv. Univ. et al. as Amicus Curiae Supporting Respondents, *supra* note 118, at 28 ("We question whether this is a cognizable constitutional complaint.").

<sup>194</sup> See, e.g., BOWEN & BOK, *supra* note 166, at 289 ("Almost everyone, on all sides of this debate, would agree that in an ideal world race would be an irrelevant consideration."); Jack Greenberg, *Affirmative Action in Higher Education: Confronting the Conditions and Theory*, 43 B.C. L. REV. 521, 611 (2002) ("Narrow tailoring requires that a program be limited in time so that it 'will not last longer than the discriminatory effects it is designed to eliminate.' I am not aware that college or university plans include time limits, but they should, either by imposing a termination date or requiring periodic reviews of the need for affirmative action.") (quoting *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 238 (2001)).

<sup>195</sup> Remarks on Affirmative Action at the National Archives and Records Administration (July 19, 1995), in PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: WILLIAM J. CLINTON, 1995 at 1106, 1113 (1995).

<sup>196</sup> Memo on Affirmative Action (July 19, 1995), in PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: WILLIAM J. CLINTON, 1995 at 1114 (1995).

<sup>197</sup> *Grutter v. Bollinger*, 539 U.S. 306, 342 (2003).

<sup>198</sup> See Johnson, *supra* note 11, at 183.

point”<sup>199</sup> makes most sense when race is used to remedy past discrimination.<sup>200</sup> If the race-conscious remedy responds to a defendant’s past discrimination, its duration can theoretically be adjusted to the scope of the violation so remedy aligns with wrong. At some point the race-conscious remedy will have corrected the harm from past and present discrimination so race preferences will not be needed to serve the interest for which they are imposed.<sup>201</sup>

But the plan in *Grutter* was not defended or approved as a remedy for past discrimination. Michigan used race to achieve a diverse student body. A time limit seems less congruent when race is considered as one factor in achieving the compelling interest of campus diversity. A racially diverse campus presumably will still have value in twenty-five years. As Professor Robert Post put it, “the justification of diversity, unlike remedy, has no built-in time horizon; if diversity is necessary for the quality of education, it is necessary at any and all times.”<sup>202</sup> Imagine that Justice O’Connor’s expectation is met and by 2028 race-conscious admissions are no longer needed to achieve campus diversity at selective schools. Suppose, thereafter an admissions program does not consider race and some year fails to produce a critical mass of some disadvantaged minority. Should the law school simply educate a non-diverse class that year? Presumably the university could still weigh other diversity factors as a plus, such as if an applicant came from Idaho or Ecuador, or played well on the French Horn or at linebacker. If universities cannot trust a random selection of talent to furnish those types of diversity, why should they be precluded from considering what someone from a disadvantaged racial community can add if such a consideration becomes necessary to produce a student body with that type of diversity? If campus diversity is a compelling governmental interest, one

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<sup>199</sup> *Grutter*, 539 U.S. at 342.

<sup>200</sup> See, e.g., Amar & Caminker, *supra* note 50, at 543; Johnson, *supra* note 11, at 183–84; Post, *supra* note 50, at 67 n.306.

<sup>201</sup> Cf. *City of Boerne v. Flores*, 521 U.S. 507, 532 (1997) (arguing that Religious Freedom Restoration Act not proportionate to any violation due to lack of termination date).

<sup>202</sup> Post, *supra* note 50, at 67 n.306; see also Jack M. Balkin, Plessy, Brown, and *Grutter*: A Play in Three Acts, 26 CARDOZO L. REV. 1689, 1725–26 n.125 (2005).

If the point of educational affirmative action is achieving, year after year, a healthy mixture of individuals with different experiences and ideas, a university will always have to be attentive to the mix of students who apply. Thus the need to assure a critical mass of minorities who will help provide an appropriate mix of diverse experiences, beliefs, and perspectives should, in principle, be never ending.

*Id.* Foes of affirmative action recognize that a different logic regarding durational limits applies to diversity as opposed to remedial plans.

might argue that admissions offices should be able to consider race, at least as a backstop, even once such criteria become generally superfluous, in years when expectations do not pan out and the demographics produce a non-diverse class.

This argument, that precedent in support of durational limits in remedial contexts should not apply when race is used to achieve campus diversity, has some force. Four qualifications to it must be made.

First, in at least one pre-*Grutter* instance, a Court plurality suggested that time limits might be important regarding non-remedial justifications. In *Wygant v. Jackson Board of Education*, four Justices (including Justice O'Connor) were bothered that the role model theory "has no logical stopping point."<sup>203</sup> The plurality complained that it would allow the school board "to engage in discriminatory hiring and layoff practices long past the point required by any legitimate remedial purpose."<sup>204</sup> Although the role model theory has not been recognized as serving a compelling interest, it is similar to the diversity rationale because it justifies affirmative action on a basis independent of remedying past discrimination. The plurality's discussion provides at least some support for the idea that temporal considerations apply to non-remedial justifications.

Second, the diversity rationale is not totally independent of remedial considerations. The diversity rationale, to be sure, does not justify race preferences as compensation for past societal or institutional discrimination. Justice Powell specifically rejected that interest in *Bakke*<sup>205</sup> as do many champions of race-conscious admissions.<sup>206</sup> Instead, as articulated by Justice Powell in *Bakke*, the diversity rationale proceeds from the conviction that colleges and universities properly may conclude that their mission requires them to bring together persons from different backgrounds and experiences, including different racial and ethnic backgrounds and experiences. Yet race-conscious admissions are not needed or utilized to bring all minority groups to campus. They are used only regarding certain disadvantaged minorities—African Americans, Native Americans, and Hispanics—which historically

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<sup>203</sup> *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 275 (1986).

<sup>204</sup> *Id.*

<sup>205</sup> *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 307–10 (1978).

<sup>206</sup> *See, e.g., BOWEN & BOK, supra* note 166, at 283.

Neither of the authors of this study has any sympathy with quotas or any belief in mandating the proportional representation of groups of people, defined by race or any other criterion, in positions of authority. Nor do we include ourselves among those who support race-sensitive admissions as compensation for a legacy of racial discrimination.

have had little representation at selective institutions. The reason race-conscious plans are needed to diversify campuses relates to America's history of discrimination against these groups. Universities use race preferences to remedy the non-diverse status quo which would otherwise exist. Thus, the diversity rationale has a remedial component to the extent that it treats race as a plus for specific disadvantaged minorities.

Moreover, even apart from the reliance of the diversity rationale on race as a remedial factor, *Grutter* expanded the diversity rationale recognized in *Bakke* to include forward-looking instrumental considerations regarding post-campus life. Race preferences would help whites and blacks function well in a global workforce. They would make the American dream a reality for minorities. They would help America achieve its ideals. As such, after *Grutter*, the diversity rationale resembles more closely that used in remedial cases.<sup>207</sup> If durational limits are appropriate in remedial contexts, they might also be appropriate when promoting diversity. Professor Balkin put the point well:

[I]f the point of educational affirmative action is to dismantle previous forms of social stratification and place social groups on a more or less level playing field in the future, it makes more sense to think that at some point admission preferences should cease. One might believe that at some point these preferences, in conjunction with social mobility and inevitable social change, will have mitigated the most important sources of social inequality among groups.<sup>208</sup>

Third, in one sense, the effort to distinguish those precedents regarding remedial plans may miss the point. The effort rests on the assumption that time limits are appropriate simply to produce the correct amount of compensation to remedy for past discrimination. That premise may not be entirely correct. As noted above, some endorse time limits to prevent entrenchment of race preferences. Under this rationale, time limits are not conceived to make sure that affirmative action does not overcompensate disadvantaged groups. Rather, time limits ensure that race preferences end after a specified period so that they do not cause independent harm. Under this theory, time limits are as appropriate for diversity based preferences as for those created for remedial purposes. One can believe race preferences should continue for an indefinite period to achieve the interests recognized in *Grutter*, yet also believe that the world would be better if they were not

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<sup>207</sup> See, e.g., Post, *supra* note 50, at 67 n.306 ("The implicit logic of remedy actually pervades much of the rhetoric of *Grutter*.").

<sup>208</sup> Balkin, *supra* note 202, at 1725 n.125.

needed. Even proponents of race-conscious admissions recognize the merit of some day using race-blind criteria.

This truth leads to a fourth and final point regarding why the precedents regarding durational limits apply in the diversity context, too. Proponents of race-conscious admissions have not contested the relevance of time limits. Michigan Law School conceded the point in *Grutter*.<sup>209</sup> Most striking is the language Professor Jack Greenberg included in a 2002 article: "I am not aware that college or university plans include time limits, but they should, either by imposing a termination date or requiring periodic review of the need for affirmative action."<sup>210</sup> Justice O'Connor adopted this formula.<sup>211</sup> It is difficult to view some time limits as illegitimate when proponents of race-conscious plans accept them.

The foregoing discussion speaks to the propriety of some durational limit, not of a twenty-five year Court-imposed provision. The precedents do not support a restriction that would terminate race preferences before they fulfill their mission. The remedial cases, by and large, suggested that the duration of race classifications should be measured by the time required to address the need to which the preference responded.<sup>212</sup> Under that formula, the precedents make the time limit dependent upon race-conscious admissions becoming obsolete. Indeed, Justice O'Connor tied the twenty-five year expectation to the success of race preferences in furthering "the interest approved today."<sup>213</sup> *Grutter*'s twenty-five year expectation lacked precedential support if it was intended to limit race preferences before their work is complete.

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<sup>209</sup> See, e.g., Brief for the Respondents, *supra* note 44, at 32 ("The Law School of course recognizes that race-conscious programs must have reasonable durational limits.").

<sup>210</sup> Greenberg, *supra* note 194, at 611.

<sup>211</sup> *Grutter v. Bollinger*, 539 U.S. 306, 342 (2003).

<sup>212</sup> See, e.g., *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 237-38 (2001) (relating duration of preferences to elimination of discriminatory effects); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 510 (1989) (race preferences must be in service of "goal of equality"); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 275 (1986) (relating race preferences to remedial need); *Fullilove v. Klutznick*, 448 U.S. 448, 513 (1980) (Powell, J., concurring) (noting that temporary nature of remedy will ensure race preferences program "will not last longer than the discriminatory effects it is designed to eliminate").

<sup>213</sup> *Grutter*, 539 U.S. at 343; see *id.* at 342 (race preferences should be used "no more broadly than the interest demands"); *id.* at 343 (Michigan will terminate program "as soon as practicable.").



### D. Consequential Argument

Constitutional argument frequently considers the consequences of different doctrinal choices. Courts often shape constitutional doctrine based on an assessment of the projected costs and benefits of governmental programs. The legitimacy of durational limits turns in part on an assessment of the consequences of race preferences. One who doubts the efficacy of race-conscious admissions or who worries about their costs might oppose them, as for instance do Justices Thomas and Scalia, or encourage sunset provisions. Conversely, one who believes the benefits of such programs exceed their costs and that their work is not complete would tend to encourage a more open-ended timetable. As discussed, few seek to justify race-conscious admissions once society reaches a point at which, without resorting to them, universities and professional schools can select and educate a class including a critical mass of disadvantaged minorities.<sup>214</sup> Thus, the question regarding the legitimacy of durational limits really asks whether such programs should terminate before society reaches that stage.

This section does not attempt an overall assessment of the consequences of race preferences. Space does not allow that discussion, nor is it the issue at hand. This section addresses a much more limited question. Assume that the twenty-five year expectation is meant to sunset race preferences in 2028 before they have completed their work. Would such an outcome be legitimate based on its consequences?

*Grutter*, of course, recognized the merit of race preferences. It assigned great value to creating a society in which disadvantaged minorities have fair opportunities to fully participate. "Effective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized."<sup>215</sup> The "benefits" from diversity, Justice O'Connor said, are "substantial."<sup>216</sup> The range of amicus briefs filed in *Grutter*—by leaders of major corporations, educational institutions, the military—reflect the broad commitment of these elites to that premise. Six members of the Court agreed that campus diversity is a compelling interest, in part to achieve that vision.<sup>217</sup> Campus diversity is not, of course, an end in itself. It is rather a means to afford students of different

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<sup>214</sup> See, e.g., BOWEN & BOK, *supra* note 166, at 289 ("Almost everyone, on all sides of this debate, would agree that in an ideal world race would be an irrelevant consideration.").

<sup>215</sup> *Grutter*, 539 U.S. at 332.

<sup>216</sup> *Id.* at 330; see also *id.* at 333–34 ("These benefits are not theoretical but real.").

<sup>217</sup> *Id.* at 329 (representing views of Justices O'Connor, Stevens, Souter, Ginsburg, and Breyer); *id.* at 378–88 (Kennedy, J., dissenting).

raises the opportunity to learn and experience each other.<sup>218</sup> Moreover, it increases the likelihood that society's leaders will come from different racial and ethnic groups.<sup>219</sup> These benefits of campus diversity are contingent on race-conscious admissions. Studies suggest that absent race preferences, the number of African Americans at selective institutions at least would be cut in half and probably would be reduced much more sharply.<sup>220</sup> *Grutter* recognized the absence of suitable race-neutral means to achieve diversity.<sup>221</sup>

From a consequentialist perspective, these benefits would justify continuing race preferences until their work is done only if the benefits exceed likely costs. What then are the costs that time limits seek to address?

Professor Fried worries that race preferences may become permanent and thereby establish racial segmentation as an entrenched feature of society.<sup>222</sup> Accordingly, group identity, rather than individual merit, will become a perennial criterion. Such an approach is divisive in that it "encourage[s] all Americans to see themselves not as members of a national community but of tribes struggling for racially allocated shares of every pie."<sup>223</sup> Professor Fried believes Justice O'Connor's twenty-five year timetable is too long. He would mitigate the costs of entrenchment by shortening the duration:

It may be that the only way to get beyond racism is just to stop using race—not today or tomorrow but with all deliberate speed, in, say, five or seven years. Only with such a determinative end point will institutions have the

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<sup>218</sup> See, e.g., BOWEN & BOK, *supra* note 166, at 279.

Race almost always affects an individual's life experiences and perspectives, and thus the person's capacity to contribute to the kinds of learning through diversity that occur on campuses. This form of learning will be even more important going forward than it has been in the past. Both the growing diversity of American society and the increasing interaction with other cultures worldwide make it evident that going to school only with "the likes of oneself" will be increasingly anachronistic. The advantages of being able to understand how others think and function, to cope across racial divides, and to lead groups composed of diverse individuals are certain to increase.

*Id.*

<sup>219</sup> *Grutter*, 539 U.S. at 332–33.

<sup>220</sup> See, e.g., *Grutter*, 539 U.S. at 320 (reciting the law school expert's testimony predicting drop from 14.5% to 4%); BOWEN & BOK, *supra* note 166, at 31–36; Greenberg, *supra* note 194, at 526–28, 548 (citing data); Linda F. Wightman, *The Threat to Diversity in Legal Education: An Empirical Analysis of the Consequences of Abandoning Race as a Factor in Law School Admissions Decisions*, 72 N.Y.U. L. REV. 1, 27–28 (1997).

<sup>221</sup> *Grutter*, 539 U.S. at 340.

<sup>222</sup> FRIED, *supra* note 71, at 239.

<sup>223</sup> Taylor, *supra* note 8, at 104.

incentive to confront the political pressures arrayed against a truly unitary concept of citizenship.<sup>224</sup>

Professor Fried's conclusion does not necessarily follow from his premise. The fact that race preferences might last longer than we would prefer does not mean that they will become permanent. It is perfectly consistent to favor race preferences until they are unnecessary while believing they should not last forever. One might recognize that society should dispense with race preferences once unnecessary without committing to an artificial cutoff date. In other words, Professor Fried's concern regarding entrenchment would be met by an agreement to sunset these programs when unneeded, not necessarily by a specific time limit chosen absent evidence of projected circumstances. Moreover, Professor Fried's argument seems to assume that once race preferences end, "a truly unitary concept of citizenship" will emerge. Yet the wages of past discrimination make it impossible for America to become racially neutral simply by ending minority preference programs. In a variety of ways, disadvantaged minorities begin with a set of handicaps that history has imposed.<sup>225</sup> It is unrealistic to view a present without race preferences as racially neutral while the powerful legacy of a racially skewed past persists.

Professor Peter H. Schuck puts a different spin on the entrenchment point. Race preferences resist termination because they spawn bureaucracies and interest groups committed to them. He writes, "[T]he political reality is that once affirmative action preferences are established, they are almost impossible to dismantle."<sup>226</sup> Even if the reality is as ominous as Professor Schuck suggests, the alternative is not free of cost either. The logic of his argument would ban race preferences, not simply impose sunsets. Under either an outright ban or a premature sunset, race preferences would end before race-neutral approaches would produce a critical mass of minority students. Accordingly, the benefits *Grutter* identified would be lost.

A variation of the entrenchment concern might be that race preferences erode a constitutional message against racial classifications. Some may infer from the use of race preferences to diversify campuses that racial classification for other purposes is also acceptable. Time limits might negate that inference by sending a message that government does not endorse race preferences, that it tolerates them only in limited situations.

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<sup>224</sup> FRIED, *supra* note 71, at 240.

<sup>225</sup> Blacks are twice as likely to be unemployed as whites, three times as likely to live in poverty, and twice as likely to lack health insurance. See *Gratz v. Bollinger*, 539 U.S. 244, 299 nn.1-3 (2003) (Ginsburg, J., dissenting).

<sup>226</sup> Peter H. Schuck, *Affirmative Action: Past, Present and Future*, 20 YALE L. & POL'Y REV. 1, 84 (2002).

Yet again, these costs seem overstated. To begin, the Constitution proscribes governmental conduct denying equal protection, not that which uses racial classification. Indeed, *Grutter* reaffirmed that race may be used to serve a compelling interest in a narrowly tailored way. But more importantly, it is not clear that a specific time limit does much more to combat this message than do the Court's reminders that race preferences are temporary, transitional devices. A more accurate statement would depict the constitutional norm as allowing certain racial preferences during a transitional period to afford people of different races the benefits of education on a diverse campus and to promote, in the Court's words, "one Nation indivisible."

Opponents of race-conscious admissions often cite the harm majority students suffer when they lose spots owing to race-conscious admissions.<sup>227</sup> Presumably, time limits reduce the total burden on displaced whites by shortening these programs. The reasoning behind this argument is not compelling. First, the premise behind the argument itself is problematic. The claim seems to be that it is unfair for disadvantaged minorities with lower SAT scores and grade point averages to be admitted to universities instead of whites with higher scores.<sup>228</sup> The argument gives test scores and grades a decisive status they do not have. If these criteria were the sole determinants, schools would not choose the talented musician, student leader, or tennis player instead of other applicants with higher scores. In any event, no applicant can be sure that he would have been admitted but for race-conscious admissions; they reduce the chances of a majority applicant by a relatively trivial percentage.<sup>229</sup>

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<sup>227</sup> Cf. Taylor, *supra* note 8, at 104.

<sup>228</sup> The costs of this type of harm are mitigated by the nature of the programs the Court has approved. *Bakke*, *Grutter*, and *Gratz* narrowed the type of race-conscious programs which are constitutional. Universities cannot set aside places and cannot conduct a separate admission pool for disadvantaged minorities. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 319–20 (1978). They may not use quotas. *Grutter v. Bollinger*, 539 U.S. 306, 334 (2003). They may consider racial diversity as only one of many diversity features. *Id.* at 337. They cannot pursue policies which unduly harm whites. *Id.* at 341. They cannot use mechanical formulas to award points without analyzing files on their individual merits. *Gratz v. Bollinger*, 539 U.S. 244, 271–72 (2003). In all of these respects, the Court has reduced any costs to whites of race-conscious plans.

<sup>229</sup> See Goodwin Liu, *The Causation Fallacy: Bakke and the Base Arithmetic of Selective Admissions*, 100 MICH. L. REV. 1045, 1054 (2002).

In a selection process where there are far more applicants than available opportunities, the likelihood of success for any candidate is low, even under race-neutral criteria. Reserving a small number of seats for minority applicants, relative to the total number of seats, will not decrease that low likelihood very much.

To be sure, race-conscious criteria produce offers to some members of disadvantaged minority groups who otherwise would not be admitted.<sup>230</sup> This fact does not, however, constitute a harm to someone who had a more robust résumé yet missed the cut. Bowen and Bok explain:

More generally, selecting a class has much broader purposes than simply rewarding students who are thought to have worked especially hard. The job of the admissions staff is not, in any case, to decide who has earned a "right" to a place in the class, since we do not think that admission to a selective university is a right possessed by anyone. What admissions officers must decide is which set of applicants, *considered individually and collectively*, will take fullest advantage of what the college has to offer, contribute most to the educational process in college, and be most successful in using what they have learned for the benefit of the larger society. Admissions processes should, of course, be "fair," but "fairness" has to be understood to mean only that each individual is to be judged according to a consistent set of criteria that reflect the objectives of the college or university. Fairness should not be misinterpreted to mean that a particular criterion has to apply—that, for example, grades and test scores must always be considered more important than other qualities and characteristics so that no student with a B average can be accepted as long as some students with As are being turned down.<sup>231</sup>

The harm-to-whites argument proceeds on the fallacious assumption that the only relevant cost is the burden on white students denied admission.

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*Id.*; BOWEN & BOK, *supra* note 166, at 36 ("[A]dmitting fewer blacks . . . would result in only a modest increase in the odds of admissions for candidates of other races."); Thomas J. Kane, *Racial and Ethnic Preferences in College Admissions*, 59 OHIO ST. L.J. 971, 992–93 (1998) (perceived impact on non-minorities of race-conscious admissions is far greater than actual impact.); Thomas J. Espenshade & Chang Y. Chung, *The Opportunity Cost of Admission Preferences at Elite Universities*, 86 SOC. SCI. Q. 293, 298 (2005) (white applicants hurt little by race preferences).

<sup>230</sup> Many who believe race-conscious admissions are unfair to whites endorse race-neutral alternatives like the ten percent plan, which seeks to achieve racial diversity by admitting the top students from each high school. Since many high schools are racially segregated based on residential patterns, such plans are designed to admit students based on their performance at their school rather than based on cross-school comparisons. Yet these plans are vulnerable to some of the same criticisms leveled at race-sensitive admissions. Such plans would also disadvantage white (and black) students at schools with higher SATs and grade point averages. These arguments, which are treated as convincing when used against race preferences apparently are not persuasive against race-neutral plans. The disappointed high-scoring white student who is not offered a place might equally complain about the preferences given athletes, alumni children, artists, or musicians. In each case, admission decisions reflect a judgment regarding the overall needs of the institution and society.

<sup>231</sup> BOWEN & BOK, *supra* note 166, at 277–78.

Absent race-conscious admissions, many students, white and black, would be denied a diverse educational experience. If the Court limits preferences before society reaches the point at which campus diversity can occur on its own, the Court simply moves the loss away from those few whites who are not admitted to a selective institution due to race preferences and shifts it to those whites and blacks who were admitted but miss out on the benefits of a diverse campus.

Time limits do little to reduce the harm to whites. The Court has found that preferences, like Michigan Law School's, do not impose an undue burden on whites.<sup>232</sup> Once race preferences are unnecessary, presumably, universities will abandon them because they will achieve a diverse class through race-blind criteria.<sup>233</sup> Setting time limits to apply when race-sensitive selections are unneeded seems redundant, like setting the alarm clock to sound after you are up. To impose time limits before society reaches that stage is anomalous. It ignores the cost to those students denied a diverse education and to society from the loss of the other benefits that Justice O'Connor recognized.<sup>234</sup> Moreover, such reasoning allows society to burden whites denied admission today but not in the future. It is not clear why the benefits would justify the burden in 2027 but not in 2029.

Finally, a fourth possible cost of race-conscious admissions relates to their impact on those seen as their primary beneficiaries—disadvantaged minorities. Opponents of race-conscious admissions suggest a number of ways in which those programs harm minorities. Some argue that race-conscious admissions programs place disadvantaged minority students in settings where they are unlikely to succeed.<sup>235</sup> Others argue that race-sensitive admissions impose stigma on all minority students—that it implies

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<sup>232</sup> See *Grutter*, 539 U.S. at 341.

<sup>233</sup> Cf. *id.* at 343 (presuming good faith of university in terminating program when unneeded).

<sup>234</sup> See *id.* at 330–32.

<sup>235</sup> See *Grutter*, 539 U.S. at 372 (Thomas, J., concurring in part, dissenting in part).

The Law School tantalizes unprepared students with the promise of a University of Michigan degree and all of the opportunities that it offers. These overmatched students take the bait, only to find that they cannot succeed in the cauldron of competition. And this mismatch crisis is not restricted to elite institutions.

*Id.*; Richard H. Sander, *A Systematic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367, 478–79 (2004); Taylor, *supra* note 8, at 105–06. But see David L. Chambers et al., *The Real Impact of Eliminating Affirmative Action in American Law Schools: An Empirical Critique of Richard H. Sander's Study*, 57 STAN. L. REV. 1855, 1898 (2005); David B. Wilkins, *A Systematic Response to Systematic Disadvantage: A Response to Sander*, 57 STAN. L. REV. 1915, 1960–61 (2005).

that their admission should be attributed to their race rather than to their "merit."<sup>236</sup>

These claims are controversial at best; other studies refute them and suggest that race-conscious admissions benefit minorities.<sup>237</sup> Although the college dropout rate for blacks is higher than for whites, the graduation rate for blacks at selective schools exceeds that for blacks with similar entering credentials at less selective schools.<sup>238</sup> Blacks who attend selective institutions tend to obtain postgraduate degrees,<sup>239</sup> contribute as civic leaders,<sup>240</sup> earn more,<sup>241</sup> and recall fondly their undergraduate experience.<sup>242</sup> Another study finds that blacks who graduate from University of Michigan Law School are also quite successful, and the authors predict similar results at other elite law schools.<sup>243</sup>

No doubt some stigma exists, and it exacts some cost. Ultimately, the question is whether the benefits justify the costs. In this regard, several points are worth making. First, some studies show that successful blacks believe affirmative action programs benefit recipients by overwhelming proportions.<sup>244</sup> Presumably, they would not endorse these programs if the

<sup>236</sup> See *Grutter*, 539 U.S. at 373 (Thomas, J., concurring in part, dissenting in part).

It is uncontested that each year, the Law School admits a handful of blacks who would be admitted in the absence of racial discrimination. Who can differentiate between those who belong and those who do not? The majority of blacks are admitted to the Law School because of discrimination, and because of this policy all are tarred as undeserving. This problem of stigma does not depend on determinacy as to whether those stigmatized are actually the "beneficiaries" of racial discrimination. When blacks take positions in the highest places of government, industry, or academia, it is an open question today whether their skin color played a part in their advancement. The question itself is the stigma—because either racial discrimination did play a role, in which case the person may be deemed "otherwise unqualified," or it did not, in which case asking the question itself unfairly marks those blacks who would succeed without discrimination.

*Id.*; see Taylor, *supra* note 8, at 104–05; STEPHEN L. CARTER, REFLECTIONS OF AN AFFIRMATIVE ACTION BABY (1991).

<sup>237</sup> See, e.g., BOWEN & BOK, *supra* note 166; Richard O. Lempert et al., *Michigan's Minority Graduates in Practice: The River Runs Through Law School*, 25 LAW AND SOC. INQUIRY 395, 422–29, 432 (2000).

<sup>238</sup> BOWEN & BOK, *supra* note 166, at 61, 258–59.

<sup>239</sup> *Id.* at 110–14.

<sup>240</sup> *Id.* at 156–60.

<sup>241</sup> *Id.* at 123–25.

<sup>242</sup> *Id.* at 194–201.

<sup>243</sup> See Lempert, *supra* note 237, at 395.

<sup>244</sup> BOWEN & BOK, *supra* note 166, at 265 (reporting study showing well-off blacks think affirmative action helps recipients, 55%–4%).

stigma they perceived outweighed the benefits they saw. Second, the diversity rationale tends to mitigate perceptions of stigma. Unlike compensatory justifications of race-conscious admissions, the diversity rationale attributes the admission of each person to a judgment that he or she would contribute more to the institution and/or society than any applicant who was not admitted. The diversity rationale therefore attacks the premise (disadvantaged minorities were admitted independent of their merit) that serves as the basis for the stigma argument. Third, any stigma that race preferences create accounts for only part of the relevant analysis. It must be balanced against the stigma that would result in a world in which blacks and other minorities were scarcely represented at society's central institutions.<sup>245</sup>

The harm-to-minorities argument is accordingly unsubstantiated. Even if the argument were supported, however, it would not affect the merits of the debate over durational limits. The pertinent point here is that a twenty-five year time limit does nothing to mitigate any harm to minorities. If, contrary to the evidence, race preferences on balance harm minorities, society cannot justify continuing them on the grounds that the harm will not last much longer. The Equal Protection Clause would prohibit their further use, and society would need to find some alternative way to secure the benefits attributed to race preferences. Durational limits cannot be justified to minimize harm to minorities.

### *E. Institutional Competence and Process*

The twenty-five year expectation is subject to challenge based on a different criterion, one which asks not whether the Court correctly interpreted the Constitution, but rather whether the Court was competent to issue the expectation it announced. The twenty-five year expectation, on almost any reading, is unusual. It is hard to recall another case in which the Court has upheld the constitutionality of a governmental program but stated an expectation that at a certain point in the future the program will be unnecessary or unconstitutional. As Justice Scalia put it, judges make law "as

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<sup>245</sup> See Randall Kennedy, *Persuasion and Distrust: A Comment on the Affirmative Action Debate*, 99 HARV. L. REV. 1327, 1331 (1986).

In the end, the uncertain extent to which affirmative action diminishes the accomplishments of blacks must be balanced against the stigmatization that occurs when blacks are virtually absent from important institutions in the society. The presence of blacks across the broad spectrum of institutional settings upsets conventional stereotypes about the place of the Negro and acculturates the public to the idea that blacks can and must participate in all areas of our national life. This positive result of affirmative action outweighs any stigma that the policy causes.



*judges make it*, which is to say *as though* they were ‘finding’ it—discerning what the law *is*, rather than decreeing what it is today *changed to*, or what it will *tomorrow* be.”<sup>246</sup> Legislatures, not courts, generally impose time limits on governmental programs since such decisions allocate societal resources.<sup>247</sup> Courts do, of course, define limits on their own orders but the imaginable instances seem distinguishable. Sometimes, courts do so incident to imposing a remedy for a past harm they have identified. The dimension of the wrong provides some natural limit for the remedy.<sup>248</sup> At times, courts limit the precedential value of their decisions by including language tying the decision to its peculiar facts. Courts apply this strategy in extremely important and idiosyncratic cases—*Dames & Moore v. Regan*<sup>249</sup> and *Bush v. Gore*<sup>250</sup> are two examples which come readily to mind. This tactic subjects the Court to the criticism that it is not acting judicially by applying rulings of general applicability, but opportunistically, by fashioning rules to handle one vexing situation.<sup>251</sup> *Grutter* involved a quite different problem. There is nothing unusual about the fact pattern it presented, and the Court did not purport to tailor its opinion to apply only to it. Courts have been criticized for implementing constitutional norms with quantitative tests remote from constitutional text. For instance, *Roe v. Wade*<sup>252</sup> was criticized as judicial legislation in part because the Constitution’s text hardly implied the trimester formula. Yet, Justice Blackmun’s resolution at least used then valid scientific knowledge to inform the Court’s consideration regarding societal interests in the health of the mother and fetus.

Some view *Grutter* as imposing a judicial sunset and suggest that this device represents a way for the Court to mitigate long-term reliance on a constitutional decision.<sup>253</sup> Although constitutional precedent is inherently fragile, the Court may abandon it for a variety of reasons. Still, based on reliance interests, the Court often hesitates to depart from a precedent.

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<sup>246</sup> James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 549 (1991) (Scalia, J., concurring).

<sup>247</sup> See, e.g., Johnson, *supra* note 11, at 173.

<sup>248</sup> See, e.g., United States v. Paradise, 480 U.S. 149, 185 (1987).

<sup>249</sup> Dames & Moore v. Regan, 453 U.S. 654, 688 (1981) (case involving settlement agreement to Iran crisis).

<sup>250</sup> Bush v. Gore, 531 U.S. 98, 111 (2000) (case involving contested 2000 presidential election).

<sup>251</sup> See, e.g., HOWARD GILLMAN, THE VOTE THAT COUNTED 162–63 (2001) (citing this criticism of *Bush*, 531 U.S. 98).

<sup>252</sup> Roe v. Wade, 410 U.S. 113, 166 (1973).

<sup>253</sup> See, e.g., Cordes, *supra* note 7, at 742; see also Amar & Caminker, *supra* note 50, at 542 (assuming point for purpose of argument); Katyal, *supra* note 10, at 1238 (describing sunset as “at least one way to view” twenty-five year expectation).

Indeed, many proponents of race-conscious admissions used just this argument in *Grutter* to urge the Court to follow Justice Powell's *Bakke* opinion.<sup>254</sup> The twenty-five year expectation might be a way to free a future Court from feeling bound to follow *Grutter* at a point when race preferences appear less valid.

This explanation does not render the twenty-five year expectation orthodox. The Court might have achieved the same effect without the twenty-five year expectation. It simply might have included the four paragraphs on durational limits without using the twenty-five year marker. Such an opinion would have put the world on notice that race preferences did not enjoy a perpetual blessing. Reliance would be less reasonable as time passed.

Even if a court could normally impose such a time limit, one would expect it to do so based on evidence. Justice O'Connor's choice of twenty-five years seems serendipitous. There was no evidence to support an expectation that race preferences would be superfluous in a quarter-century, and she cited no real empirical data to support that period. She simply stated that twenty-five years had passed since Justice Powell approved the use of race to provide a diverse student body in *Bakke* and that progress had been made. But she cited no reason to believe that progress would continue at a pace which would make race-conscious admissions unnecessary in 2028. Did she choose twenty-five years to preserve the symmetry with the Court's *Bakke* decision a quarter-century earlier? Had thirty years passed since *Bakke*, would she have offered a thirty-year period? Or twenty years? It is hard to know.

Moreover, there is little reason to share Justice O'Connor's optimism. It is hard to find anyone who regards the twenty-five year expectation as realistic.<sup>255</sup> To be sure, society has made progress in moving toward the vision of a racially inclusive society. The number of minorities graduating from college and entering the professions is much greater than it was forty

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<sup>254</sup> See, e.g., Greenberg, *supra* note 194, at 617.

<sup>255</sup> See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 376 (2003) (Thomas, J., concurring in part, dissenting in part) ("No one can seriously contend, and the Court does not, that the racial gap in academic credentials will disappear in 25 years."); WILLIAM G. BOWEN ET AL., *EQUITY AND EXCELLENCE IN AMERICAN HIGHER EDUCATION* 155-58 (2005) ("There is no reason to believe that the need for race-sensitive admissions will end within the next 25 years simply as a result of trends and policies already in place."); Taylor, *supra* note 8, at 91 (calling twenty-five year expectation "self deception or just plain deception"); Thernstrom & Thernstrom, *supra* note 8, at 265 (criticizing Court's twenty-five year expectation as "either scandalously ignorant of the real record, or deliberately and irresponsibly deceptive").

years ago.<sup>256</sup> Still, great disparities persist. Whites are more likely to enroll in college than African Americans or Hispanics.<sup>257</sup> This demographic is due in part to economics. There remains a strong relationship between race, poverty, and educational achievement.<sup>258</sup> The median income of white families with children under eighteen is twice that of African American and Hispanic families. African Americans and Hispanics are three times as likely to live in poverty<sup>259</sup> and are much more likely to attend schools in impoverished communities where far less is spent per student than in suburban communities.<sup>260</sup> Not surprisingly, teacher quality suffers.<sup>261</sup> Whereas 42% of whites and 34% of Asian Americans read at a proficient (or higher) level on national tests, only 22% of Hispanics and 16% of African Americans achieve those levels.<sup>262</sup> About 50% of African American and Hispanic students drop out of high school.<sup>263</sup> Minority students are less likely to be encouraged to attend college, less likely to take the SATs, and less likely to do well on the tests.<sup>264</sup> Although the gap between the performance of white and African American teenagers on standardized tests narrowed from 1977 to 1990,<sup>265</sup> progress did not continue. On the contrary, the gap stopped closing and began to widen somewhat.<sup>266</sup> The SAT disparity between white and black college applicants to selective colleges is also substantial. The Thernstroms report that, in 1999, whereas 5.5% of whites scored at least 700 in the verbal SAT and 5.8% reached that level in math, only 0.76% of African Americans did that well on the verbal exam and only 0.6% in math.<sup>267</sup> Indeed, in 2003, on average, African Americans scored ninety-eight points worse than did whites on the verbal SAT and 108 points worse on the math test. The picture among law school applicants is also bracing. The Thernstroms report that at

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<sup>256</sup> See, e.g., HOWARD BALL, *THE BAKKE CASE: RACE, EDUCATION, AND AFFIRMATIVE ACTION* 202–04 (2000).

<sup>257</sup> Fifty-five percent of African Americans and less than fifty percent of Hispanics, compared to sixty-five percent whites, between the ages of eighteen and twenty-four, enrolled in college in 2001. BOWEN, *supra* note 255, at 75.

<sup>258</sup> See Gary Orfield & Chungmei Lee, *Why Segregation Matters: Poverty and Educational Inequality*, in THE CIVIL RIGHTS PROJECT, 5–7 (2005).

<sup>259</sup> BOWEN, *supra* note 255, at 76.

<sup>260</sup> *Id.* at 78.

<sup>261</sup> Orfield & Lee, *supra* note 258, at 5, 7.

<sup>262</sup> BOWEN, *supra* note 255, at 83.

<sup>263</sup> Orfield & Lee, *supra* note 258, at 6.

<sup>264</sup> BOWEN, *supra* note 255, at 79–81.

<sup>265</sup> Thernstrom & Thernstrom, *supra* note 8, at 267–69.

<sup>266</sup> *Id.* at 267–69; BOWEN, *supra* note 255, at 79.

<sup>267</sup> Thernstrom & Thernstrom, *supra* note 8, at 269.

the fourteen most highly ranked law schools, the median LSAT is at least 165 and the median grade point average is at least 3.5. In 2002, only twenty-nine of the 4461 law school applicants with those credentials were black.<sup>268</sup>

In essence, Justice O'Connor's twenty-five year timetable, whether a holding, expectation, or instrumental device to stimulate action, rested on no evidence and finds no factual basis. One wishes that Justice O'Connor had paid attention to counsel on this point from *The Shape of the River*, the leading study of the subject.<sup>269</sup> There, William G. Bowen and Derek Bok acknowledged that it would be comforting to be able to predict with confidence when race preferences would be unnecessary. "But we do not know how to make such a prediction, and we would caution against adopting arbitrary timetables that fail to take into account how deep-rooted are the problems associated with race in America,"<sup>270</sup> they advised. As such, the twenty-five year expectation fails a basic test for judicial opinions.

The twenty-five year expectation raises judicial process issues for another reason. Courts sometimes cannot elect or elect not to resolve issues with bright line rules. Yet, even when courts prescribe ad hoc or multi-factor tests, one hopes that they will do so clearly. Indeed, clear exposition is one of our expectations of judicial decisions. At times, judicial opinions are unclear because the Court fails to anticipate a problem that later emerges or lacks a good answer for one it foresees. Before the Court issued *Grutter* on June 23, 2003, it was probably clear that the twenty-five year expectation was confusing from the circulated opinions of Chief Justice Rehnquist, and Justices Kennedy, Thomas, and Ginsburg. Justice O'Connor presumably recognized that her colleagues on both sides of the issue were divided regarding the meaning of the twenty-five year expectation. Her failure to dissipate the fog suggests that she was content, under the circumstances, to leave her meaning somewhat murky. One would have expected that if she intended to introduce a judicial sunset, she would have done so explicitly. Her failure to do so should suggest that the twenty-five year expectation should be treated as stating an aspiration.

## F. *Summing Up*

The idea that race preferences should be seen as transitional devices of limited duration represents a legitimate, indeed an orthodox constitutional

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<sup>268</sup> *Id.* at 271-72; see also Brief for Respondents, *supra* note 44, at 5 (reporting that, in 2000, 3,173 whites and twenty-six African Americans scored 165 on LSAT and had at least 3.5 G.P.A.).

<sup>269</sup> BOWEN & BOK, *supra* note 166.

<sup>270</sup> *Id.* at 289.

position. It comports with prevailing constitutional norms and indeed is not subject to serious dissent. The same cannot be said regarding the suggestion which some impute to *Grutter* that race preferences must end in twenty-five years even if they have not completed their work. That interpretation does not represent the best reading of *Grutter* for reasons stated earlier. Moreover, that view conflicts with the antistatutory rationale of the Equal Protection Clause, is inconsistent with judicial precedent, and finds no support in consequentialist argument. Nor does such a deadline comport with conventional judicial practice.

#### IV. *BROWN*, *BROWN II*, AND THE TWENTY-FIVE YEAR EXPECTATION

*Brown* and *Brown II* offer further reason as to why the Court should resist interpreting the twenty-five year expectation as a time limit on race-conscious admissions. Whereas *Brown* represents constitutional ideals that counsel against terminating race preferences prematurely, *Brown II* offers historical lessons which should guide society as it seeks to reach a point which would render them unnecessary.

##### A. *The Shadows of Brown and Brown II*

*Brown*, of course, occupies a special place among American constitutional decisions, a status that was recognized during 2004 by the scores of celebrations of its jubilee anniversary. Its significance relates in large part to its role in rectifying the legalized system of apartheid that existed in the United States. In *Brown*, the Court considered whether, consistent with the Equal Protection Clause of the Fourteenth Amendment, states could maintain racially "separate but equal" public schools. In a unanimous opinion, the Court held that, in public education, "separate but equal" was inherently unequal. As such, it essentially held that racially segregated public schools violated the Equal Protection Clause of the Fourteenth Amendment. Its companion case, *Bolling v. Sharpe*,<sup>271</sup> reached the same conclusion regarding the District of Columbia public schools under the Due Process Clause of the Fifth Amendment.

Although *Brown* was controversial in its day, it has emerged as a constitutional icon<sup>272</sup> which represents at least four fundamental

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<sup>271</sup> *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954).

<sup>272</sup> See Jack M. Balkin, *Brown as Icon*, in *WHAT BROWN V. BOARD OF EDUCATION SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S LANDMARK CIVIL RIGHTS DECISION 3* (Jack M. Balkin ed., 2001).

constitutional tenets regarding race.<sup>273</sup> First, *Brown* recognized the central role of education to the American dream.<sup>274</sup> Segregated education violated Equal Protection because it denied that dream to black children. Education was intrinsic to good citizenship, exposed a child to cultural values, and prepared him to pursue a profession. "In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education."<sup>275</sup>

Second, *Brown* signified the ideal of One America. Whereas *Plessy v. Ferguson* bifurcated America into two communities, *Brown* represented an America where people of different races learned, ate, rode, and lived together. *Brown* effectively regarded all of "the people," black and white, as members of a single community.<sup>276</sup>

Third, *Brown* embraced the antisubordination ideal as the best understanding of the Equal Protection Clause. As discussed above, the Court clearly saw the problem presented to it as the subjugation of blacks, not the use of racial classifications.

Finally, *Brown* signified the principle that majorities should treat minorities in a manner that accorded them status as full members of the community.<sup>277</sup> *Brown* found it troubling that segregation effectively told black children that they were lesser members of the community. The implicit message in *Brown*'s key sentence was that majorities must be sensitive to how minorities reasonably perceived their actions.

Having decided in *Brown* that separate but equal schools were inherently unconstitutional, the Court delayed, pending further argument, a decision regarding the remedy for the constitutional harm it had found. When *Brown II* finally issued fourteen months later, it deferred the realization of what *Brown* promised. Its decree reflected a concern for Southern sensibilities, a belief that the constitutional norm that *Brown* articulated must be implemented with tolerance towards those who rejected it. The Court's remedial order was organized around several central features. First, resolution of the five cases which comprised *Brown* and *Bolling v. Sharpe* would turn on "different local conditions."<sup>278</sup> As such, the cases were

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<sup>273</sup> See generally Goldstein, *supra* note 14, at 789-90.

<sup>274</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

<sup>275</sup> *Id.*

<sup>276</sup> *Id.* at 494-95 ("Whatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*, this finding is amply supported by modern authority. Any language in *Plessy v. Ferguson* contrary to this finding is rejected.").

<sup>277</sup> *Id.* at 494 ("To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.").

<sup>278</sup> *Id.* at 298.

remanded to the courts which originally heard them, generally federal district courts. Second, “equitable principles” would guide the remedies.<sup>279</sup> These included balancing the plaintiff’s personal interest against “the public interest in the elimination of . . . obstacles in a systematic and effective manner.”<sup>280</sup> Finally, school boards must “make a prompt and reasonable start”<sup>281</sup> toward complying with *Brown*; they must move with “all deliberate speed.”<sup>282</sup> The rights of the school children who were harmed were recognized, but deferred. Desegregation was to proceed with “all deliberate speed,” a classic constitutional oxymoron. Southerners recognized the adjective “deliberate” as license to delay; the noun “speed” lost all meaning amidst the formulas that signaled a patient and gradual approach. President Eisenhower did next to nothing prior to Little Rock to advance the cause of school desegregation; Congress was dominated by Southern segregationists; the Supreme Court largely abandoned the field for half a generation; and by 1964, a decade after *Brown*, only one percent of Southern blacks attended integrated schools.<sup>283</sup>

*Brown* and *Brown II* thus present competing constitutional visions. *Brown* symbolizes aspirations for a just society. *Brown II* represents society’s willingness to sacrifice that vision to accommodate other pressures.<sup>284</sup>

### B. *Brown and the Twenty-Five Year Expectation*

The core messages of *Brown* provide further guidance as to how society should resolve ambiguity in Justice O’Connor’s twenty-five year timetable. Those ideals—making the American dream accessible to minorities, One America, the antisubordination rationale, and solicitude for minorities—all suggest that society should not end race preferences prematurely. The *Brown*

<sup>279</sup> *Id.* at 300.

<sup>280</sup> *Brown*, 349 U.S. at 300.

<sup>281</sup> *Id.*

<sup>282</sup> *Id.* at 301.

<sup>283</sup> See generally GERALD ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 50 (1991).

<sup>284</sup> Of course, this account is subject to the complaint that it ignores the actual relationship between *Brown* and *Brown II*. Indeed, Chief Justice Warren obtained a unanimous Court in *Brown* because he was willing to compromise by acting in a tolerant way to the South. Without *Brown II*, there would not have been *Brown*, or at least, not a unanimous one. This objection is historically true but beside the point for present purposes. *Brown* and *Brown II* are relevant here not to recreate how the Court reached the decisions it did. Rather, they are models of different ideals to help shape future constitutional choice. We celebrate *Brown* as a statement of societal aspirations and ignore *Brown II*. Their historical interdependence does not impeach the symbolic power of *Brown* or the lessons to be learned from *Brown II*.

ideals all assign high priority to creating an America in which blacks and other disadvantaged minorities have fair opportunity to participate fully in American life. Some of these ideas echo in *Grutter*. Justice O'Connor, for instance, cited *Brown* in acknowledging the central role of education in creating opportunity for all.<sup>285</sup> She also spoke of the importance of cross-racial understanding,<sup>286</sup> an idea which relates to the fourth *Brown* factor identified above, and she invoked *Brown*'s One America ideal in justifying race preferences.<sup>287</sup>

To be sure, opponents of race-conscious admissions also claim to act in accordance with at least some of these ideals. For instance, those who support durational limits based on the antientrenchment rationale argue that race preferences imperil the One America ideal by perpetuating racial politics. This position is unpersuasive because its proponents fail to explain how One America will emerge in a context in which disadvantaged minorities see their numbers diminish at elite institutions. Assuming race preferences continue to produce benefits, their abandonment before their work is complete would further delay achieving *Brown*'s promise. Given America's embarrassing history regarding race, the minority status of blacks, and the evidence that race preferences yield benefits, it is certainly reasonable to give such race preferences in admissions the benefit of the doubt. In 2028, the United States will prepare to celebrate *Brown*'s seventy-fifth anniversary. It would be anomalous to observe it by withdrawing prematurely from a remedy designed to help make its promise reality.

### C. *Lessons from Brown II*

*Brown II* also has lessons to contribute regarding the legitimacy of the twenty-five year expectation. To be sure, in some obvious ways *Grutter*'s twenty-five year period differs significantly from "all deliberate speed." *Brown* involved public elementary and secondary schools; *Grutter*, higher education. "All deliberate speed" was problematic because it did not command a beginning; the concern regarding *Grutter* is that the twenty-five year period may end too soon. The institutions subject to all deliberate speed in 1955 resisted integration; those using race-conscious plans want to continue them. In *Brown II*, the Court feared the spectre of violence by

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<sup>285</sup> *Grutter v. Bollinger*, 539 U.S. 306, 332 (2003) ("If the dream of one nation, indivisible, is to be realized").

<sup>286</sup> *Id.* at 330.

<sup>287</sup> *Id.* at 332 ("Effective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized.").



Southern white majorities; *Grutter*'s twenty-five year period has nothing to do with violence but reacts to a perceived burden on white applicants.

In an ironic, perhaps perverse sense, *Brown II* might even lend support to the reading advanced here of the twenty-five year expectation. Justice O'Connor used some of the *Brown II* formulations to discuss durational limits in *Grutter*. *Brown II* thought desegregation should occur "as soon as practicable,"<sup>288</sup> whereas *Grutter* took comfort that Michigan's Law School would end race preferences "as soon as practicable."<sup>289</sup> *Brown II* required "a prompt and reasonable start,"<sup>290</sup> whereas *Grutter* called for "reasonable durational limits."<sup>291</sup> *Brown II* called upon school boards to show "that additional time is necessary";<sup>292</sup> *Grutter* required universities to conduct "periodic reviews to determine whether racial preferences are still necessary."<sup>293</sup> *Brown II* repeatedly referred to a "transition" period.<sup>294</sup> *Grutter* clearly saw race preferences as a transitory device. Might the use of these *Brown II* formulations, whether conscious or not, suggest that *Grutter* intended a patient attitude towards race preferences?

Yet in more basic ways, *Brown II* speaks powerfully to the challenges universities face as the twenty-five year limit approaches. First, *Brown II* illustrates, as few cases can, the dissonance between our national aspirations and the reality in which we live. America celebrated *Brown* as a metaphor for its highest ideals. *Brown II*, in prescribing all deliberate speed, was willing to compromise its vision to accommodate white sensibilities. To be sure, the Court faced intractable obstacles. Perhaps the course it chose, though mistaken, was reasonable under the circumstances. The important point is that *Brown* proclaimed ideals, but *Brown II* was willing to compromise its grand vision.

Does *Grutter* hint at a similar tendency? The Court articulated high ideals. It acknowledged that universities have "a compelling interest in attaining a diverse student body." Diversity, the Court said, confers "substantial" benefits in promoting better understanding and relationships between people of different races. Higher education must be made available to persons of all racial and ethnic groups if the dream of one Nation,

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<sup>288</sup> *Brown v. Bd. of Educ.*, 349 U.S. 294, 300 (1955).

<sup>289</sup> *Grutter*, 539 U.S. at 343.

<sup>290</sup> *Brown*, 349 U.S. at 300.

<sup>291</sup> *Grutter*, 539 U.S. at 342.

<sup>292</sup> *Brown*, 349 U.S. at 300.

<sup>293</sup> *Grutter*, 539 U.S. at 342.

<sup>294</sup> *Brown*, 349 U.S. at 300-01.

indivisible is to be realized.<sup>295</sup> Yet, *Grutter* ultimately follows its statement of these magnificent visions of an open and pluralistic society by a concern that the experiment with race admissions not continue too much longer.<sup>296</sup> Does the twenty-five year period hint at a limited investment in achieving the constitutional norm? Whereas *Brown II* deferred implementing the constitutional norm *Brown* recognized, *Grutter* suggests to some that race preferences might end before that work is done. If race preferences are working, as the evidence shows they are,<sup>297</sup> why should they not continue until they succeed? Perhaps ultimately, the Court will allow them to do so consistent with the reading which best captures Justice O'Connor's meaning. But the twenty-five year expectation introduces some ambiguity, and it may signal that the Court believes the means are sufficiently troubling to want to take another look down the line. It would be unfortunate if, having deferred the dismantling of racial subordination in the 1950s, the Court accelerated the end of race preferences notwithstanding signs that they were helping realize *Brown's* promise. Patience was the wrong attitude then but an appropriate one now.

*Brown II* teaches a second lesson. *Brown II* failed in part because it misjudged, in a fundamental way, the scope of the challenge. The Court thought "all deliberate speed" might appease a white majority by demonstrating sensitivity to its traditions and views. It did not anticipate the magnitude of Southern resistance. It did not understand the problem was not peculiar to the South. It soon became clear that school desegregation would prove difficult north and south, and that integration would not necessarily bring equal opportunity or equal performance.

It was not only the Court that misjudged the future. The day *Brown* was decided, Thurgood Marshall predicted an end to segregated schools within five years and an end to all segregation in less than a decade.<sup>298</sup> Yet less than a quarter century later, when *Bakke* was before the Court, he predicted one hundred more years of affirmative action would be needed.<sup>299</sup> Justice

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<sup>295</sup> *Grutter*, 539 U.S. at 332-33 ("Access to legal education (and thus the legal profession) must be inclusive of talented and qualified individuals of every race and ethnicity, so that all members of our heterogeneous society may participate in the educational institutions that provide the training and education necessary to succeed in America.").

<sup>296</sup> *Id.* at 342 ("This requirement reflects that racial classifications, however compelling their goals, are potentially so dangerous that they may be employed no more broadly than the interest demands.").

<sup>297</sup> See BOWEN & BOK, *supra* note 166, at 267-68.

<sup>298</sup> N.A.A.C.P. Sets Advanced Goals: Officials Say They Will Drive for End of Residential and Job Discrimination, N.Y. TIMES, May 18, 1954, at 16.

<sup>299</sup> JEFFRIES, *supra* note 170, at 487.

Marshall's prediction would take us to 2078, fifty years more than Justice O'Connor expects. At every stage, society has underestimated the difficulty of the challenge and the time it would take to make *Brown* reality. Justice O'Connor's expectations seem similarly optimistic.

Third, *Brown II* teaches that courts alone cannot resolve America's racial issues. To be sure, the Court first miscalculated and then retreated in *Brown II*, but it did so in part due to the absence of political leadership to support *Brown*. President Eisenhower did little to develop support for *Brown*. He repeatedly passed opportunities to endorse the Court's rejection of "separate but equal." Instead, he typically went no further than calling for calm and stating that he was constitutionally compelled to uphold the Court's decisions.<sup>300</sup> He showed greater enthusiasm in defending *Brown II*. Progress would be slow;<sup>301</sup> he pointed out repeatedly that the Court called for "gradual implementation" in view of "the deep ruts of prejudice and emotionalism that have been built up over the years in this problem."<sup>302</sup> He diverted calls for federal intervention by arguing that the Court has "turned this whole process of integration back to the district courts;" and he tended to equate Southerners who resisted school desegregation with blacks who "want to have the whole matter settled today."<sup>303</sup> And when questioned regarding the Southern Manifesto in which one hundred members of Congress pledged to attempt to reverse *Brown*, he called for "understanding of other people's deep emotions," criticized "[e]xtremists" on both sides, and refused to speculate as to how long integration would take.<sup>304</sup> Only belatedly and

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<sup>300</sup> See, e.g., The President's News Conference of May 19, 1954, in PUBLIC PAPERS OF THE PRESIDENTS, DWIGHT D. EISENHOWER, 1954, at 489, 491-93 (1960).

<sup>301</sup> The President's News Conference of Feb. 29, 1956, in PUBLIC PAPERS OF THE PRESIDENTS, DWIGHT D. EISENHOWER, 1956, at 263, 269-70 (1958) ("I expect that we are going to make progress, and the Supreme Court itself said it does not expect revolutionary action suddenly executed.").

<sup>302</sup> The President's News Conference of Jan. 25, 1956, in PUBLIC PAPERS OF THE PRESIDENTS, DWIGHT D. EISENHOWER, 1956, at 182, 186 (1958); see also The President's News Conference of March 14, 1956, in PUBLIC PAPERS OF THE PRESIDENTS, DWIGHT EISENHOWER, 1956, at 301, 304 (1958).

<sup>303</sup> The President's News Conference of Sept. 5, 1956, in PUBLIC PAPERS OF THE PRESIDENTS, DWIGHT D. EISENHOWER, 1956, at 732, 736 (1958).

The South is full of people of good will, but they are not the ones we now hear. We hear the people that are adamant and are so filled with prejudice that they even resort to violence; and the same way on the other side of the thing, the people who want to have the whole matter settled today.

*Id.*

<sup>304</sup> *Id.*

reluctantly did he send federal help to protect black children whose safety was endangered for trying to integrate Little Rock's high school.<sup>305</sup>

Had President Eisenhower used his bully pulpit to support desegregation rather than distancing himself from *Brown*, perhaps school integration would have proceeded more smoothly than it did. Real progress was made only after the 1964 Civil Rights Act and subsequent legislation provided the tools to integrate schools, and the President provided support. Courts have a role to play, but we will not make progress without effective political leadership at the national level, as well as in communities, businesses, and educational institutions. In this regard, President Bush's response has been disappointing. He claims to value diversity, yet calls the Law School's approach a quota and suggests that *Grutter* calls for race-neutral approaches rather than race-conscious admissions.<sup>306</sup>

Finally, *Brown II* restores the problem of race-conscious admissions to proper perspective. *Brown II*, like *Brown*, was about providing equal education to school children so that they could succeed in America. As such, it is a reminder that the controversy over race-conscious remedies at colleges and universities is but part of a larger problem. The real problem relates to the education being offered, or not offered, to many minority children in elementary and secondary schools.

It seems evident that race preferences in university admissions will not become expendable simply on their own momentum. Progress has been made and university programs have made an important contribution. Yet they address only a relatively small portion of disadvantaged racial communities, those who apply to selective colleges. They do nothing to help those whose opportunities or ambitions do not extend that far. Nor do they contribute to the critical task of growing the pool of blacks and Hispanics applying to colleges and professional schools and comprising the pool of the most competitive applicants. Judge Harry T. Edwards put it well:

History has shown that affirmative action in higher education is inadequate to solve some of the greatest barriers to racial equality, which include the problems of the African-American underclass. The integration of more advantaged African Americans in institutions of higher education has not improved the lot of the least advantaged African Americans, most of whom

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<sup>305</sup> See RICHARD KLUGER, *SIMPLE JUSTICE* 753–54 (1975).

<sup>306</sup> President George W. Bush, Remarks on the Michigan Affirmative Action Case (Jan. 15, 2003), available at <http://www.whitehouse.gov/news/releases/2003/01/print/20030115-7.html>; President George W. Bush, President Applauds Supreme Court for Recognizing Value of Diversity (June 23, 2003), available at <http://www.whitehouse.gov/news/releases/2003/06/print/20030623.html>.

do not attend quality elementary and secondary schools. While giving a nod to the ideal of equality embodied in *Brown*, *Grutter* provides no relief for the unsolved and arguably intractable problem that was the subject of *Brown*: inequality in elementary and secondary public education.<sup>307</sup>

We can never move beyond race-conscious programs unless we focus on improving educational opportunities for blacks and other disadvantaged communities at the primary and secondary school levels. Recognizing this need is certainly not rocket science. Michigan told the Supreme Court so in its Brief in *Grutter* in explaining why race-neutral alternatives would not work:

The disparities in academic preparation that make such alternatives impossible today are rooted in centuries of racial discrimination. The district court found that these disparities will eventually be eliminated as our society “invest[s] greater educational resources in currently underperforming primary and secondary school systems.” Any assumption that they are inevitably “permanent” merely because three decades of modest effort have not yet erased them should not be dignified with a place in our constitutional jurisprudence.<sup>308</sup>

## V. CONCLUSION

Justice O'Connor's twenty-five year “expectation” reflects an optimism that, in a generation, the disadvantages that hinder many minority applicants will disappear. The goal of making that vision a reality, at long last, presents an appealing, yet daunting challenge. It is unclear that it can be met, but it has no chance unless the political branches, private entities, institutions, and businesses make the Court's expectation a national priority. Meeting the challenge of *Grutter* ultimately circles back to *Brown*. Fifty years ago, America belatedly began an effort to provide integrated and equal educational opportunities for black children in America's public schools. The lessons from that experience should be a starting point in crafting a strategy to meet Justice O'Connor's expectation of rendering race-conscious admissions unnecessary by 2028. Yet, in pursuing that course, we should recognize that, in all likelihood, race preferences will not be expendable by 2028. In that event, the best reading of *Grutter*, and of *Brown*, and the most

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<sup>307</sup> Harry T. Edwards, *The Journey from Brown v. Board of Education to Grutter v. Bollinger: From Racial Assimilation to Diversity*, 102 MICH. L. REV. 944, 974 (2004).

<sup>308</sup> Brief for Respondents, *supra* note 44, at 33 (citation omitted).

legitimate one, would require extending the duration of race preferences until their work is done.